SUPREME COURT, U. S.
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# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-714

DAVID T. DELLINGER, ABBOTT H. HOFFMAN, JERRY C. RUBIN, and WILLIAM M. KUNSTLER,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MORTON STAVIS
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

*Attorneys for Petitioners*

Adams Press Corp., 150 Cedar Street, N. Y.—Beekman 3-1050-51

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. _____

DAVID T. DELLINGER, ABBOTT H. HOFFMAN, JERRY C. RUBIN, and WILLIAM M. KUNSTLER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

David T. Dellinger, Abbott H. Hoffman, Jerry C. Rubin, and William M. Kunstler respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 6, 1974. A petition for rehearing en banc or for rehearing was denied on October 16, 1974.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 502 F. 2d 813 and is printed in the Appendix hereto at p. 1a. District Judge Gignoux, sitting by designation as District Court Judge for the remand of this case after earlier convictions of contempt in 1970 had been reversed, rendered three opinions in this matter. One, dated April 4, 1973, is reported at 357 F.

Supp. 949, another, dated December 6, 1973, at 370 F. Supp. 1304, and the third, dated November 6, 1973, is unreported and is printed in the Appendix, infra, p. 31a. The Seventh Circuit's 1972 reversal of Judge Hoffman's earlier convictions is reported at 461 F. 2d 389.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 6, 1974 and the order of that court denying a petition for rehearing en banc or for rehearing was entered on October 16, 1974. On November 4, 1974, Mr. Justice Rehnquist entered an order extending the petitioners' time to file a petition for a writ of certiorari to and including December 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

## QUESTIONS PRESENTED

### Questions Presented as to Petitioner Kunstler Alone

1. Whether a lawyer may be convicted of contempt of court because in an argument on a legal question he strongly attacked the unfairness of the judge, where it appears that the argument was made outside the presence of the jury and was spoken in a moderate voice without the use of coarse language, there was no direction by the court to discontinue, and the business of the trial continued calmly without interruption or obstruction at the conclusion of the argument?

2. May an attorney be convicted of contempt for bringing facts to the attention of the jury, allegedly in violation of a court order, when the court by its own intervening action which prompted colloquy before the jury, caused the very facts to be known to the jury, so that the court had itself nullified the order?

3. What is the proper standard of the "intent" required to sustain a conviction under 18 U.S.C., Sec. 401?

4. May a contempt conviction against an attorney be sustained where the order claimed to have been violated by him was in fact not made, where the conviction was of charges not asserted in the notice of charges, and where it appears that the judgment could have been based upon conduct plainly not obstructive?

5. Whether in a case where government prosecution counsel had committed gross misconduct, shown by the record and assumed by the trial judge to be of the same nature as that charged to defense counsel, the government may nevertheless press the prosecution of defense counsel for contempt of court while refusing to move against government counsel on the theory that contempt as a means of controlling trial counsel is a remedy to be employed only against defense counsel?

Questions Presented as to All Petitioners, Including the Petitioner Kunstler

6. Whether the procedure laid down in Alderman v. United States requiring disclosure and an adversary hearing, applies where the government admits unlawful electronic surveillance as to which a defendant has standing, in a prosecution for criminal contempt and where the government fails to make an adequate denial of surveillance?

7. Whether, where the record shows an extraordinary and pervasive pattern of misconduct by the judge and prosecutors directed at defendants and in a subsequent review it is concluded that as

a result of such misconduct there was literally a breakdown of the judicial process at important points, the defendants and counsel may nevertheless be prosecuted for contempt for their response to misconduct throughout the trial?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are the Fourth, Fifth, and Sixth Amendments to the Constitution, 18 U.S.C., Sec. 401, and Rule 42(b) of the Federal Rules of Criminal Procedure. They are included in the Appendix, infra, p. 108a-112a.

## STATEMENT OF THE CASE

### A.
### Background

The within case is the last remaining remnant of the famed Chicago conspiracy trial. 1/ This petition involves the judgments of conviction of

1/ On February 14 and 15, 1970, at the conclusion of almost five months of trial in the Chicago conspiracy case, and while the jury was still deliberating, Judge Hoffman held seven defendants and two lawyers guilty of 159 counts of contempt. He had earlier, on November 5, 1969, declared a sua sponte mistrial as to Bobby G. Seale and entered a judgment of conviction of contempt against him on 16 counts. Sentences for these convictions on 175 counts against the 10 defendants totalled more than 19 years.

A remand trial on the contempts before another judge was ordered by the United States Court of Appeals for the Seventh Circuit in this case, In re

contempt against petitioners at the conclusion of a remand trial where attorney William M. Kunstler was found guilty on two specifications; Abbott H. Hoffman and Jerry C. Rubin on two specifications each; and David T. Dellinger on seven specifications. Upon the questions submitted to this Court on this petition, the language of only the specifications relating to Mr. Kunstler is directly relevant and they are reproduced at Appendix, pp. 69a, 73a. The language of all the specifications appears as an appendix to Judge Gignoux' last opinion, 370 F. Supp. 1304.

The remand trial before Judge Gignoux of seven defendants and two defense attorneys commenced with 52 specifications. 2/ At the conclusion of

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Dellinger, 461 F. 2d 389 (1972), and the companion contempt case, United States v. Seale, 461 F. 2d 345 (1972). The Court of Appeals also reversed the substantive convictions, ordering disclosure of illegal electronic surveillance and a new trial. United States v. Dellinger, 472 F. 2d 340 (1972), cert. den., 410 U.S. 970 (1973). The government chose not to turn over the illegal electronic surveillance logs and the substantive indictments were dismissed upon the government's motion. The substantive indictment against Mr. Seale was earlier (October 1970) dismissed, also upon the government's motion. Shortly before it pressed the within case for retrial, the government dismissed the contempt charges against Mr. Seale rather than disclose electronic surveillance logs which the Circuit Court had ordered to be revealed.

2/ As pointed out by the Seventh Circuit in its most recent opinion, that Court had earlier stricken 18 specifications as being legally insufficient on their face and the government had before the remand trial unilaterally dismissed 89 of the specifications, 502 F. 2d at 820-21, Appendix, infra, p. 28a.

the government's case, Judge Gignoux granted a judgment of acquittal as to 24 charges and also dismissed two other specifications based upon the lack of specificity of those charges. At the end of the trial, Judge Gignoux entered acquittals as to thirteen additional specifications (370 F. Supp. at 1323). These acquittals resulted in the complete discharge of five of the nine defendants, including attorney Leonard I. Weinglass, and reduction of the number of specifications against the remaining four. Thus, from 10 defendants and 175 citations, the case was reduced to four defendants and 13 citations.

While he entered judgments of conviction, Judge Gignoux concluded that in view of the judicial and prosecutorial misconduct he would impose no "further" sentence upon the three defendants who had been jailed during the period following their conviction by Judge Hoffman and until the Circuit Court granted bail pending appeal. As to Mr. Kunstler, who had not been so jailed, he ordered that "no sentence be imposed " at all (370 F. Supp. at 1324).

These convictions were affirmed by the Court of Appeals (502 F. 2d 813, Appendix, infra, p. 1a) and it is the judgment of that court which is here sought to be reviewed.

The actions of Judge Hoffman at the conclusion of the conspiracy trial in 1970, the number of contempt citations of which he convicted trial participants on the defense side, the length of the prison sentences imposed by him, and the language used by him in his description of the alleged offenses were unprecedented in Anglo-American jurisprudence and produced what is now recognized to have been a wholly unjustified "panic" 3/ in the

3/ See the Preface to the Report of the Special

trial bar and the judiciary. Judicial review, a careful study of the record by a prestigious committee of the Association of the Bar of the City of New York, and finally Judge Gignoux' opinions have produced a wholly different estimate of that trial. Each such review has strengthened the conclusion that the defendants and attorneys in the Chicago trial were victims rather than culprits.

Several months after the Circuit Court reversed the contempt convictions on the ground that Judge Hoffman should not have sat thereon, it reversed the substantive convictions in United States v. Dellinger, 472 F. 2d 340. In that opinion, the court for the first time considered the details of the actions of Judge Hoffman and the prosecutors and set forth in six footnote-packed pages its criticism of their conduct. It concluded that their conduct would have constituted reversible error even if the court had not decided to reverse on other grounds. The court referred to Judge Hoffman's "deprecatory and often antagonistic attitude towards the defense ... evident from the very beginning" and revealed in several hundred remarks which "telegraphed to the jury the judge's contempt for the defense," 472 F. 2d at 386-87, emphasis added; see also, id., fns. 83 and 84.

In May of 1973, the Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York after two years of study filed a monumental report which is undoubtedly the most comprehensive study ever made of disorder in court. The Special Committee, whose appointment

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Committee on Courtroom Conduct of the Association of the Bar of the City of New York, Disorder in the Court, filed in May, 1973, and published in 1974. The Court is respectfully referred to this report in its entirety.

was prompted by this case and one other, 4/ included persons of extraordinary stature at the bar. In what was almost a recounting of experiences at the Chicago trial as detailed in the Circuit Court's opinion, 472 F. 2d at 385-91, the Special Committee emphasized:

> "Ultimately, the problem of courtroom disorder is one that the trial judge must solve. There are some cases in which a judge was the principal agent in creating disorder or in aggravating potentially disruptive conditions." 5/

The Committee enumerated the following classifications of judicial misconduct:

> "1. Arbitrary, biased, or vindictive remarks or rulings...
> 2. Bickering with counsel...
> 3. Interfering with presentation by counsel ..." 6/

Judge Gignoux, after setting out the detailed statements of the Circuit Court in its opinion (472 F. 2d at 388-89) as to improper conduct of the judge and prosecutors, said "the tapes and the eyewitness testimony presented before this court amply support these findings of the Court of Appeals." 370 F. Supp. at 132.

The totality of the evidence led Judge Gignoux to make the following significant finding:

> "[W]ith the exception of the two specifications relating to the 'robe' incident (Hoffman VII and Rubin VI), the contumacious conduct of

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4/ Disorder in the Court, supra, p. 3. The other case was the so-called New York Black Panther case.

5/ Id. at 262.

6/ Id. at 262-63.

the four remaining defendants can, in each instance, reasonably be said to have been in response, albeit an excessive response, to peremptory action by the judge." Ibid.

Another finding of fact by Judge Gignoux should finally dispel the view of this conspiracy trial which was repeatedly projected by Judge Hoffman and government counsel. Judge Gignoux concluded that the government had not succeeded in establishing the existence of a plan by the defendants to destroy the original trial (370 F. Supp. at 1321, fn. 22). 7/ This unproved theory of the government remained with this case up to the bitter end and seems to have been the main reason why the case was pressed for retrial. 8/

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7/ The late Professor Harry Kalven, who did an independent review of the Chicago contempt proceedings during the heighth of public controversy over the conduct of the defendants, was the first to point out that the record negated the theory of planned disruption, Kalven, Introduction to Contempt (Swallow Press) 1970, xviii-xix.

8/ The record before Judge Gignoux included the testimony of U.S. Attorney James Thompson, who described a conference in the Department of Justice two days before the commencement of the trial and one week after Elliot Richardson had resigned as Attorney General. At that conference, most of the top aides of the Department of Justice wanted to drop the case and it was clear that that had been the view of Messrs. Richardson and Ruckelshaus. Messrs. Thompson and Henry Petersen were the only ones who pressed for retrial and then acting Attorney General Bork permitted Mr. Thompson to proceed.

Finally, in connection with the origins of the hostility of Judge Hoffman towards Mr. Kunstler, Judge Gignoux made a finding which is of critical importance. It has been generally recognized that the original trial started breaking down as a result of the immediate and rippling effects of the judge's mishandling of the Bobby Seale incident. 9/ The trial record shows that Judge Hoffman sought to solve the problem of the trial's getting out of hand by holding lawyers responsible for his conflict with Mr. Seale. On the first day of trial, he adjudicated four lawyers in contempt and ordered the two of them who were present to jail, 10/ in an effort to pressure Mr. Seale to withdraw his demand that the trial be delayed so that he could have his own lawyer, Charles Garry, represent him. Thereafter, on innumerable occasions, the judge with unrestrained anger insisted that Mr. Kunstler was Mr. Seale's lawyer and blamed him for the conduct of his "client." 11/

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9/ The Circuit Court has said that a proper handling of the Seale matter might "well have obviated many of the difficulties that later occurred," United States v. Seale, 461 F. 2d 345, 358 (1972). See also, Kalven, Introduction to Contempt, supra, xxii.

10/ The attorneys would have been in jail over the weekend except that they were released by order of a Circuit Court judge. The following Monday, Judge Hoffman relented and vacated his order. Judge Hoffman's handling of this entire matter was criticized by the Circuit Court in its opinion reversing the substantive convictions, 472 F. 2d at 386, fn. 80.

11/ Throughout the trial, Judge Hoffman repeatedly insisted that Mr. Kunstler was Mr. Seale's lawyer (H. Tr. 4838, 4946; to avoid confusion,

references to the transcript before Judge Hoffman appear as "H. Tr."; references to the transcript before Judge Gignoux appear as "G. Tr."). He read the notice of appearance which Mr. Kunstler had filed (id. at 5009), threatened Mr. Kunstler, "I tell you some day you will have to explain it" (id. at 4725), and raged that Mr. Kunstler could not "quit in the middle of the trial" (id. at 5399) when Mr. Kunstler rightfully refused to cross-examine a government witness on behalf of Mr. Seale, who was not his client. The trial judge noted, "You have been telling me you don't represent him [Mr. Seale] when you do of record" (id. at 4774). "If you were any kind of a lawyer, you would" defend Mr. Seale (id. at 4938). "There is a paper in this record which tells me you are his lawyer and I don't want to have to repeat that again" (id. at 5398). After the prosecutor charged that Mr. Kunstler was "play[ing] fast and loose with the defendant's constitutional rights," Mr. Kunstler protested that such comments made "this jury feel that I am in some way neglecting my duty to Mr. Seale" (id. at 5400-02). The trial judge refused to admonish the prosecutor for this attack before the jury, thereby condoning it. Even after Mr. Seale was mistried, the judge repeatedly referred to Mr. Kunstler's proper refusal to represent Mr. Seale. He characterized the refusal as "very serious" (id. at 7221), insisted that Mr. Seale was still in the case (id. at 14810), and told Mr. Kunstler he was "your client" (id. at 17374). The prosecutor said Mr. Kunstler represented Mr. Seale but would not defend him (id. at 8423), that Mr. Kunstler had refused to ask a question in Mr. Seale's behalf after filing a notice of appearance for him (id. at 13066). There is a whole colloquy by the prosecutor on Mr. Kunstler's representation or lack of representation of Mr. Seale (id. at

Judge Gignoux made an express finding that: "Mr. Kunstler was not the attorney who was advising Mr. Seale or who was responsible for Mr. Seale's conduct." (G. Tr. 4128.)

We turn now to additional facts relevant to the specific questions presented for review.

## B.
## Facts Specifically Relevant to the Questions Presented for Review to this Court

### 1. Facts relevant to the alleged contempts of Mr. Kunstler (Questions 1, 2, 3, and 4)

Mr. Kunstler was convicted of two specifications of contempt, designated VI and VII, both as a result of incidents which arose on February 2, 1970, in the fifth month of the trial.

### Specification VI [12/]

The background for this specification was well summarized by Judge Gignoux (370 F. Supp. at 1319):

"On Friday, January 30, Mr. Kunstler

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13066-71). The prosecutor said about Mr. Kunstler and Mr. Seale, "This is just a ploy, your Honor. This is clearly just a ploy" (id. at 697); "a ploy" (id. at 3132); "Mr. Kunstler gets very confused as to whom he represents... He was when it came to Bobby Seale... Because Mr. Kunstler led him down a primrose path" (id. at 13066-68). The court joined the prosecutor's attack on Mr. Kunstler regarding Mr. Seale (id. at 13066-71.

12/ Appendix, infra, p. 69a.

represented to the court that the defendants had completed the presentation of their 'live' witnesses. He requested and obtained a weekend recess 13/ so that the defense might locate a cameraman necessary to authenticate a film, the admission of which, together with certain documents, would conclude the defense case. On Monday morning, February 2, Mr. Kunstler informed the judge that over the weekend the defendants had learned that the Reverend Ralph Abernathy had returned to the United States from Europe and would be available to testify later that morning. Mr. Kunstler asked to be relieved of his prior commitment in view of this unforeseen development. The government objected, and the judge denied Mr. Kunstler's motion. At this point, Mr. Kunstler made the extended remarks set forth in Kunstler VI."

Dr. Abernathy was a critical defense witness for the reasons contained in Mr. Kunstler's statement, which Judge Hoffman would not allow to be designated as an offer of proof although he allowed it in the record (H. Tr. 19185-88), and as fully developed in the testimony of Messrs. Kunstler and Weinglass before Judge Gignoux (G. Tr. 1483-1503, 2282-85).

In essence, as the Seventh Circuit explained in its opinion on reversal of the substantive convictions, 472 F. 2d at 348-49), the defendants in the

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13/ The only reason Mr. Kunstler was required to seek a recess was that Judge Hoffman had insisted upon adding Saturday sessions during the defense case. There were no weekend sessions during the government's presentation of its case. (Footnote not in court's opinion.)

earlier trial had been charged with planning a riot in Chicago through the Mobilization Committee Against the War in Vietnam and the Youth International Party. Dr. Abernathy was co-chairman of the Mobilization (472 F. 2d at 349). Had he been permitted to testify, he would have established that he had approved all the major plans of the organization. But more specifically, the government had presented the testimony of Deputy Superintendent of Police Rochford to the effect that Dr. Abernathy's "Poor People's Mule Train" had been led out of the demonstration area at the request of its leader, made to the witness Rochford because the people in the mule train feared violence from the demonstrators. Mr. Kunstler contended that the facts were the opposite of Mr. Rochford's testimony and that Dr. Abernathy was prepared to testify that he wanted his mule train to remain because he did not believe that the demonstrators were in any way violent, but it was Rochford who insisted that he leave (G. Tr. 2283-84). This particular incident at Michigan Avenue and Balbo Street, as explained in the Circuit Court's opinion on the substantive case (472 F. 2d at 353), was the major "confrontation and battle" relied upon by the government in support of its contentions that the defendants had conspired to violate the anti-riot statute.

Mr. Kunstler further testified before Judge Gignoux that the defendants for at least 10 days had sought to locate Dr. Abernathy to obtain him as a defense witness in the trial before Judge Hoffman (G. Tr. 2282). 14/

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14/ As explained by Mr. Weinglass, the ruling of Judge Hoffman on January 24, 1970, refusing to permit defendant Davis to testify as to what Dr. Abernathy said at the public meeting of August 29, 1968, made it absolutely critical that Dr. Abernathy testify personally (G. Tr. 1485).

This was the posture on the morning of February 2, 1970, when Mr. Kunstler advised the court of a new development, namely, that the defendants had located Dr. Abernathy, who had just returned from Europe, and asked for leave to put Dr. Abernathy on the stand despite his representation to the court on the preceding Friday (H. Tr. 19102). He explained that Dr. Abernathy was "arriving at this moment at O'Hare Airport" (id. at 19104) and assured the court that "his testimony is not long and it would be the last witness we would offer" (id. at 19105).

The government objected to Dr. Abernathy's being permitted to testify and there was a heated debate which continued for 11 pages. The debate reflected both the strain of nearly five months of a grueling series of trial confrontations and the extraordinary frustrations of the defendants at being denied a critical witness by a ruling which was certainly one of the most egregious of Judge Hoffman's many acts of unfairness.

Towards the end there occurred the argument in the record which constitutes the first of the two specifications of contempt of which Mr. Kunstler was convicted.

As part of his argument before Judge Hoffman, Mr. Kunstler referred to the court's ruling as "outrageous" and he contended that the court had previously, by the exclusion of Ramsey Clark's testimony, "violated every principle of fair play." He contended that the court was relying on the "technicality" of a promise to rest which had been made in "perfect good faith," to exclude testimony. He argued that Dr. Abernathy had relevant testimony and charged "that doesn't mean much in this court." He said that Judge Hoffman was "doing a disservice to the law" in his ruling that the Reverend Abernathy could not take the stand. Towards the conclusion of his argument he charged that

"there is no meaning in this court, and there is no law in this court ... and these men are going to jail by virtue of a legal lynching." He concluded with a comment, "Your Honor is wholly responsible for that, and if this is what your career is going to end on, if this is what your pride is going to be built on, I can only say to your Honor, 'Good luck to you'." (H. Tr. 19108-112.)

The transcript and the tape 15/ reveal that --

a) The jury was not present during the entire colloquy;

b) At no time did Mr. Kunstler raise his voice beyond the normal level of a lawyer making an argument (G. Tr. 2292);

c) The argument was indeed, as testified by Mr. Kunstler, "forceful and vigorous" (id. at 2291); "I argued I guess as vigorously as I have ever argued in my life because of the great importance of Dr. Abernathy" (id. at 2292); however strong the argument, the language was not coarse;

d) The argument was sufficiently lawyer-like to be persuasive. While it did not at first bring about a change in Judge Hoffman's ruling, it caused the government to realize the error of excluding Dr. Abernathy's testimony, as a result of which the government withdrew its objections (id. at 2292-93; H. Tr. 19138) if Dr. Abernathy were in the courtroom;

e) During the argument, Mr. Kunstler was never directed by Judge Hoffman to stop talking and there was no reprimand by the judge;

f) Directly after the argument, with no

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15/ By good fortune, the court reporters had made a tape recording of the original trial which had remained extant. Selected portions were played before Judge Gignoux and were part of the record on appeal.

indication of tensions, the court and counsel for 25 pages (H. Tr. 19113-37) handled housekeeping functions relating to the closing of the defendants' case, e.g., the marking of exhibits, rulings on motions to quash subpoenas, etc.

## Specification VII [16]

The only other specification against Mr. Kunstler arises out of a further development in connection with the foregoing incident and on the same day. It will be noted that Judge Gignoux in his appendix describes the specification as having two separate parts. This is not the way Judge Hoffman charged it and the government pressed it (461 F. 2d at 449-52).

Following Mr. Kunstler's argument and Judge Hoffman's refusal to permit Dr. Abernathy to take the stand, there occurred the following colloquy among assistant prosecutor Schultz, the court, and Mr. Kunstler:

"MR. SCHULTZ: Your Honor, may the defendants and their counsel then not make any reference in front of this jury that they wanted Dr. Abernathy to testify?

MR. KUNSTLER: No, no.

THE COURT: I order you not to make such a statement." (H. Tr. 19140.)

There then followed a colloquy in which Mr. Kunstler in part stated that he would not abide by such an order and in part pleaded with the judge to reconsider his ruling not permitting Dr. Abernathy to take the stand. He emphasized, "He will be here in five minutes." (H. Tr. 19141-42.) This concludes what Judge Gignoux designates as Part I of Specification VII.

At this point the jury was brought in and there

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16 / Appendix, infra, p.73a.

appears a further colloquy in the transcript of the proceedings before Judge Hoffman which incomprehensibly does not appear either in the specification as drawn up by Judge Hoffman 17/, nor in the revised specifications prepared by the government, nor, surprisingly, in the appendix prepared by Judge Gignoux.

This colloquy, which is decisive in the evaluation of this charge, was as follows:

> "THE COURT [addressing the jury]: I must inform you that I have called on the defendants to produce whatever witness they had, and they had none ready to proceed, and they did not indicate that they would rest. Hence, I entered an order indicating that the defendants were not ready to proceed as they indicated on Friday they would be, and I let the record show in your presence that the defendants have rested. The word 'rested' in law means they have no further evidence to present.
>
> MR. KUNSTLER: We object to that, your Honor. Dr. Ralph David Abernathy is on his way from the airport to this courtroom. We informed your Honor and requested a few moments. He has just arrived back in the country. We want the jury to understand we do not rest. We are prepared to go ahead. We ask merely a few minutes' recess to bring Dr. Abernathy to the stand." (H. Tr. 19143-44.)

At the time that he made the foregoing statement, Mr. Kunstler was in no way admonished by the court, and at no time has that statement been charged with having been a matter of contempt (G. Tr. 2310-11). Judge Hoffman having made his

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17/ In Judge Hoffman's enumeration, this is specification XXI, 461 F. 2d at 449.

statement to the jury, Mr. Kunstler obviously had a duty to his clients to reply and correct the judge's misstatement to the jury.

Immediately thereafter, the government made the following statement which did not even suggest a violation of an order but did include a direct communication to the jury challenging the truthfulness of the defense representations to the jury:

> "MR. SCHULTZ: The Government's position is if he were here, we wouldn't object to their putting him on, even though they said they had no more witnesses. We want to proceed with the trial. They don't know when he is going to be here. They have said he was going to be here for the last hour." (H. Tr. 19144.)

At that point in the proceedings, as a result of a series of events set in motion by the judge, the jury knew the facts concerning Dr. Abernathy.

Ten pages and 16 minutes later, Dr. Abernathy arrived and Mr. Kunstler had his colloquy with the court which is the basis for what Judge Gignoux calls Part II of Specification VII. While the witness Robert Lynskey was on the stand, Mr. Kunstler moved that Judge Hoffman reconsider his ruling that Dr. Abernathy would not be permitted to testify. Judge Hoffman refused to entertain this motion and, referring to Dr. Abernathy, three times stated, "Let him sit down." Mr. Kunstler then asked the judge to "permit an application for Doctor Abernathy to testify after the witness has testified." Judge Hoffman refused to respond to the request and Dr. Abernathy left the courtroom after some further colloquy between Mr. Kunstler and the judge.

In a lawyer-like manner, Mr. Kunstler made one last effort as the luncheon recess was declared, and while Dr. Abernathy was still available, to have Judge Hoffman reconsider his ruling. He was repulsed with a curt, "There has been a

decision." (H. Tr. 19180.) After lunch, Dr. Abernathy having already left town (id. at 19184), and because the government so requested (id. at 19192). Judge Hoffman indicated to counsel that he would permit Dr. Abernathy to testify the following morning (id. at 19234). Mr. Kunstler advised the court he would attempt to produce Dr. Abernathy then (id. at 19235), but Dr. Abernathy was not available (id. at 19285).

Close inspection of the language of Judge Hoffman's charge and the findings of Judge Gignoux shows important differences. It will be observed that Judge Hoffman in his specification (which was never amended though there was ample power to do so, United States v. Seale, 461 F. 2d 372) charged that Mr. Kunstler violated an order to "not mention the name of Reverend Abernathy in front of the jury." The record shows that no such order was made! It will also be noted that Judge Gignoux stated that Mr. Kunstler "flagrantly and defiantly violated the court's order not to renew his motion in the presence of the jury." The record shows that no such order was made and no such order was even charged. It will also be observed that there are two distinct parts of this specification. There is no clear indication in the judgment of conviction as to whether that judgment is based on both parts.

2. Facts relating to discriminatory prosecution of Mr. Kunstler (Question 5)

In arguing the motion to dismiss because this was a selective and discriminatory prosecution, counsel for the defense demonstrated that the charges of contempt against defense counsel described misconduct of which government counsel

were repeatedly guilty, and Judge Gignoux recognized this when he stated that he would accept arguendo "that the government counsel in this case were guilty of violations ... that you have listed." 18/ (G. Tr. 624.)

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18/ Although Judge Gignoux assumed arguendo that government counsel were guilty of "contumacious misconduct," we shall give a few brief references to show that that assumption was massively supported by the record and to establish the force of defendants' assertions.

a) Violation of orders of Judge Hoffman. This is the claimed basis of the conviction of Mr. Kunstler on Specification VII.

On September 29, 1973, Judge Hoffman expressly directed "that the gentlemen of the government should not make derogatory statements to the lawyers for the defendants. If you feel that any conduct of the lawyers for the defense needs admonition or discipline from the court, please move the court for the exclusion of the jury, then I will be glad to hear you." (H. Tr. 913.) On the following page Judge Hoffman later reiterated that order (id. at 914).

The record of this case shows consistent and deliberate violation of that order by counsel for the government. The Seventh Circuit recognized the impropriety of the prosecutors' comments and gave a few examples of such conduct in its opinion reversing the substantive case, 472 F. 2d at 389, fn. 87. Our point here is not merely that the conduct was improper but that it was also in direct violation of Judge Hoffman's order.

For example, government counsel said, in the presence of the jury: "I withdraw my objection to the trick question of Mr. Kunstler" (H. Tr.

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921); [Kunstler's] "trick question" (id. at 1034); "I think ten years of education [for defense counsel] is the only answer to that" (id. at 1039); [re defense counsel] "It distorts and it is a deliberate attempt to distort..." (id. at 1622); "Mr. Kunstler is intentionally generating objections from the prosecution and with his claque back in the courtroom giggling and groaning..." (id. at 1655); "Mr. Weinglass knows that is improper" (id. at 1811); "Maybe I can suggest to Mr. Weinglass how to do that" (id. at 1835); prosecutor asks the court "to order Mr. Weinglass not to intentionally ask questions that he knows are not proper in law" (id. at 1836); "If Mr. Weinglass would elicit answers instead of just concentrating on making speeches..." (id. at 1898); [as to defense questions] "We will be here until spr ..." [to a sequestered jury!] (id. at 2254); "I don't think Mr. Kunstler does anything voluntarily" (id. at 2981); [re defense question] "...but just to make it up out of whole cloth" (id. at 3300); [Kunstler's argument] "comes out of left field"(id. at 3604); "Mr. Weinglass just cannot confine himself to the rules of the court" (id. at 3731); "His [defense counsel's] representation which predicated his asking the questions was a false representation" (id. at 3918); "Mr. Weinglass has stood before this Court and made a representation which is false" (id. at 3920); "Your Honor, if Mr. Kunstler would sit down and listen he might learn something" (id. at 4319); [re defense question] "It's silly" (id. at 4498); [re defense question] "He knows that's false" (id. at 4503); [re defense question] "here we go back on the television ... that was such a silly question" (id. at 4560); "Mr. Kunstler wants to play fast and loose with the defendant's [Seale's] constitutional rights" (id. at 5401); "Mr. Kunstler

is laughing so he can influence the jury with the impression that this is absurd. That is why he is laughing aloud..." (id. at 6288); "I am implying Mr. Kunstler's motives which are patent" (id. at 6290); [after a proper question by Kunstler to which objection was sustained] "I think Mr. Kunstler well knows it. He is trying to summarize the testimony taking little piece here and there, leaving out all of the rest, which he hasn't touched on, and trying to summarize two months of meetings in one question which can't be done" (id. at 7149); "Mr. Kunstler can't remember his own questions and answers" (id. at 7151); "Mr. Kunstler doesn't hear very well" (id. at 7154); "The question is so bad, Mr. Weinglass had trouble with the last word. He almost swallowed it because he knew an objection was coming" (id. at 7169); "Mr. Weinglass is improperly stating the testimony ... misstating the evidence" (id. at 7177); "Mr. Weinglass is really oppressed in this courtroom. Every time he opens his mouth it is, 'Am I precluded from this? Am I precluded from that?'" (id. at 7230); "I can't believe a lawyer in a Federal District Court -- Mr. Weinglass has stated to this court that he has been practicing for ten years -- would in front of the jury make a statement like that. That is absolutely undignified and unprofessional, that he stand there and make a statement like that" (id. at 7348); "I make these observations in requesting the Court to be assured from Mr. Weinglass that these are proper impeachment foundation questions and not questions made up out of whole cloth" (id. at 7357); "We are never going to complete this if Mr. Kunstler repeats everything" (id. at 8120); "Mr. Kunstler isn't trying to elicit answers; he is trying to just be smart" (id. at 8217); "I will make the objection loud this time so

Mr. Weinglass hears it..." (id. at 8276); "he [Kunstler] characterized it in his own inimitable way" (id. at 8618); [re defense question] "... I mean, this is idiotic..." (id. at 8747); "In typical fashion Mr. Kunstler is misstating the testimony" (id. at 9271); "He [Kunstler] is misstating what he is referring to" (id. at 9467); [re prosecution objection which was sustained] "can be based on Mr. Kunstler making facts up out of whole cloth..." (id. at 9569); [calls Kunstler] "that man"; [when Kunstler insists on use of his name] "What I think of calling you I won't say before ladies" (id. at 9888); [re Kunstler statement] "This is just a show-boat" (id. at 10942); "I have never heard a lawyer present a legal argument the way Mr. Weinglass does. He says, 'You haven't let me do this, you haven't let me do that,' as though he is really being oppressed. If Mr. Weinglass would follow the rules of evidence instead of trying to alter them and then say, 'Oh, but you are not letting me do this' . . . if he would follow the rules of evidence, the probative rules, instead of asking the silly questions, trying to make it appear that poor Mr. Weinglass is being taken advantage of, we could proceed with this trial" (id. at 11047); [defense attorney can't] "say just whatever comes to mind" (id. at 11149); "... and Mr. Kunstler has so very carefully told all his witnesses say what you please and when you are cut off say your Honor, this is the first time" (id. at 11291); "Mr. Kunstler very conveniently has deaf ears when his clients are acting up in court and he is the only one who doesn't hear it, and when there is evidence from the witness stand which is not to his liking" (id. at 11547); "... I am answering Mr. Kunstler's objection, which is just as I said, he doesn't hear the evidence"(id. at 11552); "Mr. Weinglass should not

play along. He should ask questions the way a lawyer should ask questions" (id. at 12404); "Mr. Weinglass, knowing the questions are not proper is asking anything to get the witness to give answers to which objections have been made" (id. at 12417); "Mr. Weinglass' conduct is not professional" (id. at 12480); "he [Weinglass] asks absurd questions" (id. at 12487); "Mr. Kunstler keeps hopping up with a few little jabs here and there and that has nothing to do with this proceeding. He thinks he is an entertainer of some sort" (id. at 12488); "That [Weinglass's question] is a grossly improper question" (id. at 12503); "If Mr. Weinglass is going to proceed, let him proceed with it according to the rules of evidence which he is not doing. Either he doesn't know how or he doesn't care about it, but he is not doing it and that is the reason this examination has gone on for over a day and a half, a bunch of hearsay, miscellaneous thoughts, retraction, going back and forth over testimony, because he doesn't know how to examine a witness" (id. at 12906); "... Mr. Kunstler gets very confused as to whom he represents... He was when it came to Bobby Seale, your Honor.. Because Mr. Kunstler led him down a primrose path" (id. at 13066-68).

b) Bringing improper matters before the jury. This appears to be another basis for the conviction of Mr. Kunstler on Specification VII. The record is again replete with innumerable cases of the prosecution bringing improper matters before the jury.

The prosecutor in the presence of the jury said that defendants Davis and Hoffman, both of whom

had testified, had perjured themselves on the stand (H. Tr. 19670). The assistant prosecutor gave his opinion in the presence of the jury on a matter that went to the heart of the charges against the defendants. He told the court in the presence of the jury that he had succumbed to the harassment of appellant Rubin and of the defendants "that started four months ago, a procedure and technique they have been using on authorities and policemen all of their lives" (id. at 14736).

The prosecution also made improper comments in the presence of the jury to defense witnesses, implying that they had been coached and were saying what defense counsel told them to say (id. at 11291, 10623-24). The prosecutor said in front of the jury that the witness then on the stand had "testified that he ... had arrested a 6-foot-four-inch man" (id. at 7739); there was no such testimony.

The assistant prosecutor on cross-examination of defense witness Ochs asked an improper question about the Pentagon incident (id. at 10595). He made a speech to the jury saying that the Pentagon incident was not as the witness had testified but "breaking through ... the lines of the United States Army, and penetrating into the Pentagon" (id. at 10597). He continued, "I think the Pentagon incident makes Mr. Kunstler nervous" (id. at 10601). Although there had been no testimony to that effect, he told the jury, "They broke through the military lines which were guarding the Pentagon, the lines were lined up in front of the Pentagon and they broke through" (id. at 10603).

Mid-trial, the assistant prosecutor declaimed before the jury for nine pages about what the evidence had shown (id. at 11546-54). The assistant prosecutor made a long, long speech about how

Judge Gignoux held that:

"Even assuming arguendo that these statements and remarks [by government counsel] constituted contumacious misconduct, this Court can find no satisfactory showing by defendants that the United States on behalf of the court, has pursued the present prosecution for a discriminatory and unconstitutional purpose."

In re Dellinger, unreported, November 6, 1973, Appendix, infra, p. 37a.

The only testimony in the record with respect to why the government did not pursue contempt action against the prosecutors was in the testimony at the remand trial of U.S. Attorney Thompson, which was directly at odds with the state of the record. 19/

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policemen were acquitted in a different trial involving the episode defense witness Sequeira was being asked about (id. at 12011-28).

c) Insults and attacks. While we believe that, short of obstruction (see our argument, infra, p. 34), insults and attacks are not contempt, it certainly cannot be said that insults have a different quality when directed at defense attorneys rather than at a judge. The record of insulting attacks by the prosecution against defense attorneys is massive and infected the entire trial. The examples given under (a), supra, are equally applicable to this category.

19/ Mr. Thompson admitted that he never took "any action" to press contempt charges against the prosecutors in the case (G. Tr. 2492-93) because "the circuit court ruled explicitly, as I recall, that their behavior did not constitute contempt of court" (id. at 2509). But he was unable to point out where the Circuit Court had so ruled, either then or "tomorrow morning" as suggested by the trial judge (id. at 2511). Inspection of the opinion to which Mr. Thompson refers shows

The contention of the government on appeal was that since misconduct by prosecutors "can be deterred by appellate reversals," the prosecution of the contumacious prosecutors for contempt was unnecessary, 20/ an admission by the government that it applies different standards to government counsel than to defense counsel in determining whether to press a criminal charge.

3. Facts relevant to the electronic surveillance issue (Question 6)

Subsequent to the remand of the contempt prosecution, the defendants made an extensive pretrial motion in which they sought the disclosure of electronic surveillance in accordance with principles laid down in Alderman v. United States, 394 U.S. 165 (1969). They also sought an evidentiary hearing with respect to the impact of such surveillance. See motion filed December 27, 1972, Appendix, infra, p. 89a.

The motion sought the disclosure of all electronic surveillance with respect to defendants, their counsel, and assistants to counsel. The defendants contended that they were entitled to a disclosure of unlawful electronic surveillance which occurred during the conspiracy trial, as well as such as might have occurred prior to the conspiracy trial.

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there is no such ruling by the Circuit Court, "explicit" (Mr. Thompson's word) or implicit.

20/ The formulation by the government was as follows:

"... misconduct by prosecutors can be deterred by appellate reversals. Thus different deterrence considerations apply to a decision to proceed on contempt charges." (Government's brief before the Circuit Court, p. 16.)

While under Alderman they were not required to demonstrate relevance or even arguable relevance, defendants nevertheless pointed out to Judge Gignoux the obvious relevance of electronic surveillance in that --

a) It was a fundamental thesis of the government in support of its claim of "intent" in the contempt charges, that the defendants had mapped a strategy of trial disruption long before the trial, while the defendants contended their intent was to have a wholly peaceful and proper trial.

b) It was the defendants' contention that much of the difficulty in the trial before Judge Hoffman arose out of a conscious and deliberate program by the prosecutors to paint a picture of disruption at the trial and to provoke it if necessary and that, in connection with such a program by the prosecution, information obtained by electronic surveillance before the trial started and during its continuance provided the fruits from which the government molded its strategic approaches.

The factual record with respect to the existence of electronic surveillance in this case was:

1) The government admitted that there had been electronic surveillance of the defendants before the conspiracy trial. 21/

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21/ This was the case in which former Attorney General Mitchell first publicly enunciated the doctrine that the President had the power on a claim of national security to conduct warrantless electronic surveillance, and in connection with that assertion admitted the existence of the electronic surveillance against the defendants. This assertion was of course rejected by this Court in United States v. United States District Court, 407 U.S. 297 (1972).

The admission of electronic surveillance was one of the grounds upon which both the substantive

2) The government failed to deny unequivocally the existence of electronic surveillance during the conspiracy trial, of or directed against the defendants, their attorneys, and the legal staff. The government presented a memorandum of Mr. Mitchell dated July 14, 1969, which, in anticipation of the pending conspiracy trial against appellants, directed:

"The telephone surveillance which I have authorized should continue under current directives. However ... [any special agent or special employee] is to immediately cease monitoring, both in person and by electronic recording, any conversation as soon as he becomes aware that one of the parties to the conversation is a defendant in a pending federal criminal case or an attorney of such defendant." (G. Tr. 4511; emphasis supplied.)

Additionally, Mr. Calhoun, an attorney with the Department of Justice, furnished an affidavit which states:

"As you were previously informed, a search was conducted to determine, inter alia, whether any of the defendants in this case (including Messrs. Weinglass and Kunstler) were overheard during the period the defendants were being tried for the substantive offenses. I have conducted a review of those records, and that review reveals that the procedures outlined in the Attorney General's

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case, 472 F. 2d 340, and the Seale case, 461 F. 2d 345, were reversed on appeals by the Seventh Circuit. In both cases, the government was directed to make disclosure if it sought retrials. In both cases, the government withdrew the prosecutions and made no disclosures.

memorandum were followed as the Attorney General instructed."

The trial court denied defendants the opportunity to explore in an adversarial context the background, meaning, and import of Mr. Calhoun's affidavit notwithstanding two major facial omissions:

1) That both the Mitchell memorandum and the Calhoun affidavit carefully omit any reference to the overhearing of legal staff other than attorneys of record; 22/ and

2) That both the memorandum and the affidavit failed to preclude the very distinct possibility that monitoring -- either in person or by electronic recording -- did in fact occur at least until the agent became aware of the identities of the parties to the conversation.

In addition, as a result of disclosures occurring after close of the trial in the civil action, Dellinger v. Mitchell, Civ. Action No. 1768-69, D.D.C., the petitioners were able to directly challenge the adequacy and accuracy of Mr. Calhoun's statement by submitting to the Court of Appeals in camera documents which demonstrated that on at least one occasion FBI Director Hoover expressed concern that a discussion of defense strategy had been monitored and improperly handled, 23/ and also that

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22/ The demand for disclosure included a list of more than 20 persons who worked on the staff, including dates of employment (Appendix, infra, p.106a. There was no question as to defendants' standing with respect to overhearings of their legal staff and it should be noted that the critical overhearing in the Seale case did not involve either Mr. Seale or his attorney but rather an intermediary. 461 F. 2d at 364.

23/ Appellants' [plaintiffs in the civil action] in camera exhibit, Memorandum, F.B.I. Director to SACS, San Francisco and Chicago, dated November 17, 1969.

one of the purposes of the surveillance was to make personality assessments and to monitor personal circumstances of the defendants. 24/

Judge Gignoux in essence ruled that trial of the contempt was sui generis to the point that the principles of Alderman requiring pretrial disclosure of electronic surveillance are inapplicable even though standing and unlawfulness are established. He denied both disclosure and an evidentiary hearing to determine what actually occurred in practice under the Mitchell memorandum and whether there had in fact been any unlawful electronic surveillance as to which they had standing (G. Tr. 3641), and he did not even require a government response re overhearing of defense staff.

Having decided that Alderman was inapplicable to the proceeding, Judge Gignoux accepted in camera submissions of electronic surveillance material and made an ex parte determination that the overhearings were not relevant. The Court of Appeals in its review of the case also reviewed the in camera submissions ex parte and concluded that the electronic surveillance was irrelevant.

In its opinion, the Court of Appeals made a serious factual error. The court said:

> "The Government turned over to Judge Gignoux for his in camera inspection logs of all overhearings requested by defendants' disclosure motion."

The foregoing is not in accord with the record; the government never turned over to Judge Gignoux overhearings of persons on the legal staff of the defendants, nor those which could have occurred even had the Mitchell memorandum been followed.

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24/ Memoranda, F.B.I. Director Hoover to Mr. Mitchell, July 23 and December 2, 1969, and June 12, 1970.

## REASONS FOR GRANTING THE WRIT

### I.

### THE PETITION PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION WHICH HAS BEEN DECIDED BY THE SEVENTH CIRCUIT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND THREATENS SERIOUS MISAPPREHENSION THROUGHOUT THE FEDERAL JUDICIAL SYSTEM THAT THE CONTEMPT PROCESS MAY BE USED FOR PURPOSES OTHER THAN THE PREVENTION OF "ACTUAL OBSTRUCTION OF JUSTICE" AND SPECIFICALLY THAT IT MAY BE USED TO PUNISH VIGOROUS DEFENSE COUNSEL IN A MANNER WHICH WOULD UNDERMINE THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT.

This point concerns the two specifications relating to Mr. Kunstler, and presents serious questions as to permissible lawyer conduct.

### A.
### Kunstler Specification VI

In a consistent line of cases, this Court has set forth a series of fundamental principles governing the use of the contempt process. They are:

1. The essence of contempt is "actual obstruction of justice," In re McConnell, 370 U.S. 230, 236 (1961), a principle which was rooted in the history of the adoption of 18 U.S.C., Sec. 401, following the impeachment trial of Judge Peck. See, Bridges v. California, 314 U.S. 252, 266 (1941).

2. As applied to lawyers, that principle has

meant that "the arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in his performance of judicial duty," McConnell, 370 U.S. at 236.

3. Absent actual obstruction, attorneys may not be charged with contempt because their statements before the court include "insults," Holt v. Virginia, 381 U.S. 131, 137 (1965), or are "disrespectful," In re Little, 404 U.S. 553, 554 (1972), 25/ because "the law of contempt is not made for the protection of judges who may be sensitive to the whims of public opinion. Judges are supposed to be men of fortitutde, able to thrive in a hardy climate," Craig v. Harney, 331 U.S. 367, 376 (1947), and "trial courts ... must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice," Brown v. United States, 356 U.S. 148, 153 (1958).

These principles as standards governing the conduct of lawyers are designed "to preserve the kind of trials that our system envisages" and "an independent judiciary and a vigorous independent bar ... both indispensable parts of our system of justice," In re McConnell, supra, 370 U.S. at 236.

But however clearly this Court may have spoken on this issue, there is constant backsliding. Many judges still think that the contempt power is a weapon available to protect their sensibilities 26/

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25/ We are not here concerned with coarse language; see the Chief Justice and Mr. Justice Rehnquest concurring in In re Little, 404 U.S. at 556.

26/ Lord Justice Salmon has identified a semantic reason for his misconception. In the recent case of Morris v. Master of Crown Office [1970] 2 W.L.R. 792 (C.A.), he said:

and, unless corrected by this Court, the opinion of the Seventh Circuit will go a long way to encourage that way of thinking.

Specification VI of Mr. Kunstler was based on a legal argument, outside the presence of the jury, during which there was no reprimand from Judge Hoffman, nor even a direction that Mr. Kunstler stop talking, and which involved no coarse language. The Seventh Circuit sought to overcome the requirement of actual obstruction of justice by claiming that Mr. Kunstler's argument constituted a "diatribe" and indeed a "vicious personal attack on the judge which could only have served to vent his spleen," 502 F. 2d at 815. But this is plainly a substitution of rhetorical language for a finding of "actual obstruction" of the trial.

How then does the Seventh Circuit seek to overcome the fact that there is obviously a missing element -- actual obstruction -- without which there can be no contempt? The manner in which the Circuit Court approaches this issue makes its decision particularly dangerous from a precedential point of view.

In three sentences in its opinion the Circuit Court tries to construct obstruction (App. 5a-6a):

a) "Because of the extreme nature of the attack on the trial judge, the remarks

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"... The archaic description of these proceedings as 'contempt of court' is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of judges and to protect them from insult. Nothing could be further from the truth. No such protection is needed. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented." Id. at 801.

of counsel created an imminent prejudice to a fair and dispassionate proceeding, thus constituting an actual and material obstruction of the judicial process." Ibid.

But the record directly contradicts the foregoing. The fact finding body, the jury, was not present, and the record plainly shows that the trial proceeded without the slightest deviation from normal business.

b) "Moreover, as the trial judge found, Kunstler's conduct 'resulted in an entirely unnecessary and not insignificant delay and disruption of the proceedings' (370 F. Supp. at 1320), reinforcing his holding that there was an actual and material obstruction of the administration of justice." Ibid.

Mr. Kunstler was addressing the court. It is obvious that had he employed other words not considered as being an attack on the court, his argument would not have been claimed to have caused "a delay and disruption of the proceedings." Thus it is self-evident that it is the choice of words, specifically the "vehemence of the language used," not the duration of the expression, on which the Seventh Circuit relies. This was especially true as Mr. Kunstler was never directed to cease speaking. This Court has expressly forbidden a contempt conviction based on "vehemence" of language, Craig, supra.

c) "Before concluding with respect to this specification, it should be noted that at their close, Kunstler's remarks predictably precipitated shouts of 'right on' and applause, again satisfying obstruction standards. 461 F. 2d at 399-400." (502 F. 2d at 815-16.)

But elementary fairness would require lawyers not be held responsible for the reaction of spectators unless there is proof of attribution. Even the Seventh Circuit recognized that in an earlier case,

In re Oliver, 470 F. 2d 10, 13 (1972). Lawyers may not be held in contempt because some impromptu eloquence evoked applause. There is not a shred of evidence to suggest that Mr. Kunstler planned the audience reaction or was in any way (except by the fact of his presentation) responsible for it.

Judge Fairchild's concurring opinion is a candid admission that there was no obstruction but that "we are willing to presume or infer the existence of obstruction where the conduct appears to us extremely inappropriate, indeed outrageous, and shocking" (502 F. 2d at 821, Appendix, p. 30a).

This statement by Judge Fairchild, which is compelled by the record, is an admission that the Circuit Court has effectively ignored the basic requirement of contempt, namely, that demonstrated actual obstruction of justice is the cornerstone thereof. In other words, the Seventh Circuit, contrary to the holdings of this Court and the history of 18 U.S.C., Sec. 401, including the impeachment of Judge Peck which led to the statute, has made criminal non-obstructive language of a lawyer which is considered excessively critical of a judge. Since misapplication of this rule of law so vitally threatens a "vigorous independent bar ... indispensable ... [to] our system of justice," In re McConnell, 370 U.S. at 236, review of the Circuit Court's determination is necessary. Particularly is this so because of the notoriety of this case and the likelihood that the opinion of the Seventh Circuit would have more than normal impact as a precedent.

B.

Kunstler Specification VII

The issue of "obstruction" in respect to Specification VII comes up in a different but equally critical manner.

Judge Gignoux divided this specification into two parts. His judgment of conviction does not make clear what the basis is upon which the conviction rests (discussed infra, Point III).

But Part I of Specification VII is a carbon copy of the facts in the McConnell case, i.e., a lawyer's stated intention to violate a court's order. In McConnell, the language was "we propose to do so unless some bailiff stops us," 370 U.S. at 235. Here the language was of the same genre.

McConnell reversed a conviction of contempt on the basis of the foregoing threat on the ground that it did not constitute obstruction; in this case, Mr. Kunstler was convicted thereon as to Part I of the specification.

Beyond that, the failure of every lower court which has dealt with this case -- Judge Hoffman, Judge Gignoux, and the Seventh Circuit -- to take serious account of 12 pages of transcript 27/ is a remarkable indication that the conviction cannot stand on the basis of a full inspection of the record and its impact on the issue of obstruction.

Lawyers of course are required to comply with a court order not to bring certain matters before a

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27/ We have set forth in the Appendix hereto the full text of the two specifications of contempt upon which these convictions are based.

With respect to Specification VII, however, we have gone further. In the version prepared by both Judge Hoffman and Judge Gignoux, 12 pages of transcript are simply omitted. As we have set it forth in the Appendix hereto, those 12 pages appear as they were in the original trial record before Judge Hoffman. The included material begins at H. Tr.19142 and terminates at H. Tr. 19154, Appendix, infra, pp. 75a-84a.

jury. But this is an issue that occurs probably in every jury trial and trial lawyers are expected also to be acutely aware of the changing nature of a situation in the courtroom. Contempt requires not only obstruction but also intent (the question as to the proper standard of "intent" is discussed infra, Point II) and a lawyer cannot be said by any standard to have intended to violate a court's order to keep matters from a jury when he does no more than take account of the intervening facts which brought the matter to the jury's attention and "moves" before the court that it reconsider its ruling. This is simply not the kind of "obstruction" which this Court envisaged in McConnell.

The Seventh Circuit's dismissal of defense contentions on that score as "frivolous" and its characterization of Mr. Kunstler's contention as being that he "got away" with violating the court order once, is a particularly dangerous precedent. It is based on simply refusing to recognize that there were 12 intervening pages of transcript which effected a significant change in the circumstances of the trial. A contempt conviction of a lawyer by a selective reading of the record is a dangerous threat to the bar.

In sustaining the foregoing specifications for contempt, the Seventh Circuit has affirmed convictions upon a theory that --

a) While disrespectful language is not contempt in the absence of actual obstruction, nevertheless if the court thinks the language too disrespectful, i.e., crossing some undefined boundary line, then actual obstruction may be established from the language itself.

b) An order, once made, must be considered unaltered by subsequent statements in the courtroom, regardless of the fact that the most reasonable interpretation of the record would make it

clear that any member of the bar would have considered the situation to have been changed by the subsequent facts.

The last contempt cases in which this Court ruled on proper standards of conduct for lawyers were In re McConnell and Holt v. Virginia, both supra. Since then criminal trials ranging from the Chicago to the Watergate conspiracy trials have generated much passion and emotion. It is obvious that the convictions of Mr. Kunstler in this case challenge this Court's view on the independence of the bar and the Constitutional right and duty of vigorous advocacy. This Court should accept the petition herein so as to reaffirm those principles as the bedrock of our adversary process.

II.

THE PETITION PRESENTS FOR REVIEW A DECISION OF THE SEVENTH CIRCUIT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, AND DEALING WITH AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BUT SHOULD BE SETTLED BY THIS COURT, NAMELY, WHAT IS THE PROPER STANDARD OF "INTENT" IN A CONTEMPT PROSECUTION UNDER 18 U.S.C. SEC. 401.

The 1972 remand decision of the Circuit Court, which governed the trial before Judge Gignoux, included extensive consideration of the proper standard for the intent requirement of a contempt prosecution. The Seventh Circuit frankly recognized a conflict among the Circuits on this matter. Since this Court has never addressed the question of the proper definition of intent in the contempt

context, 28/ it seems particularly appropriate that this Court resolve the conflict among the Circuits on this issue.

The Seventh Circuit's 1972 decision in Dellinger incorporated its extended discussion of the intent issue in United States v. Seale, 461 F. 2d 345, 367-69, the companion case decided the same day.

There the Circuit Court, referring to the conflicting rulings of the different circuits, posed the following questions:

a) Was specific intent required in all contempt citations (as appeared to be required in earlier decisions of the Fifth and Seventh Circuits and in one decision of the District of Columbia Court of Appeals) 29/ or was it required only in cases of contempt not "clearly blameworthy" (as was expounded in another decision of the D.C. Circuit) 30/.

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28/ But the Court has been very clear that "intent," however defined, is an element of the crime. In Panico v. United States, 375 U.S. 29 (1963), there was a reversal of a contempt conviction for a hearing on an alleged contemnor's "criminal" intent; and see Cooke v. United States, 267 U.S. 517, 538 (1925), "the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt." See also, In re Watts, 190 U.S. 1, 29 (1903).

29/ In re Brown, 454 F. 2d 999 (D.C. Cir., 1971); United States v. Jackson, 426 F. 2d 305 (5th Cir., 1970); United States v. Sopher, 347 F. 2d 415 (7th Cir., 1965).

30/ Offutt v. United States, 232 F. 2d 69 (D.C. Cir.), cert. den., 351 U.S. 988 (1956).

b) Assuming that a finding of specific intent is required, then as pointed out by the Seventh Circuit, the Circuits are further in conflict:

> "On this question, we also find a disparity of treatment. The poles of the intent issue are rather easily defined; at one extreme is the theory that all that is required is a willful or volitional act without regard to the known or intended consequences of the act, and at the other is the requirement that the contemnor actually intended his act to obstruct the judicial process... See Caldwell v. United States, 28 F. 2d 684 (9th Cir., 1928)."

The Seventh Circuit then proceeded to reject this Ninth Circuit formulation and opted for its own:

> "Intent is better defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." 461 F. 2d at 368.

We will argue before this Court that especially on the question of lawyer contempts such a standard is inconsistent with accepted doctrine that proven specific intent of the nature of a "vicious will," an "evil purpose or mental culpability" (Morissette v. United States, 342 U.S. 246, 251, 252) is required where the definition of a criminal offense is vague. 31/

As applied to alleged contempt of a lawyer charged with an offense based on advocacy, the standard which in essence is the "reasonable lawyer" standard is particularly inappropriate because it does not recognize the peculiarly individualistic

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31/ See, e.g., Screws v. United States, 325 U.S. 91, 101 (1945); Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925).

aspects of advocacy. Vigorous advocacy is the working premise of the adversary system. It is neither a matter of parlor niceties and classroom academics nor a matter of doing what every other lawyer does. A good trial lawyer is a fighter willing to butt his head with other trial participants on behalf of his client. And he may be a good trial lawyer precisely because he has the courage to be exceptional.

Of course he may not intentionally obstruct. But the definition of that intention is critical. For if an attorney could be held in contempt even where he has no wrongful intent, such a threat necessarily curtails a vigorous defense. Only the hardiest of men would press his case to the limits of his right to do so, if he were told that his conduct might be judged by what the "reasonable lawyer" does. The defendant's case would then be cautious, hesitant, and inadequate.

The Seventh Circuit recognizes the adversary role of lawyers when it says:

> "Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows." 461 F. 2d at 400.

But all of this is improperly limited by the statement that --

> "[A]n attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth." Ibid.

The result of the foregoing is that when Judge Gignoux tried the case and the Circuit Court

reviewed his judgment, Mr. Kunstler's intent was tested -- not by whether his protestations that he meant not to obstruct were believed -- but rather by what the reasonable lawyer would have done. See opinion of Judge Gignoux on motion for judgment of acquittal, Appendix, infra, 31a at 58a. We believe that even so tested, Mr. Kunstler's conduct should not have been found culpable. Even if the test is that of a "reasonable lawyer" acting in the "heat of controversy," Mr. Kunstler's conduct does not rise to the level of contempt. He did no more than did one of California's leading members of the bar when by a comment to the jury he insisted on protecting his client from a plainly prejudicial statement the judge made to the jury, Cooper v. Superior Court, 55 Cal. 2d 291, 10 Cal. Rptr. 842, 359 P. 2d 274 (1961). But we believe the issue of the proper definition of the standard is a question that must be determined before we deal with the application of the standard to the facts of this case.

We suggest that this issue is of singular importance to the bar. The absence of a clear guide from this Court has resulted in a division of the Circuits on an issue which cannot tolerate uncertainty. We have stated the position which we will assert if the Court should grant the petition. We believe that the social value of encouraging a vigorous and independent bar is inconsistent with the "reasonable lawyer" test. But if the Court should disagree, it should at least enunciate its view and not force the bar to struggle through the thicket of conflicting Circuit Court decisions.

III.

THE PETITION PRESENTS FOR REVIEW IMPORTANT QUESTIONS OF PROCEDURAL DUE PROCESS IN THE CONTEMPT CONTEXT: A) WHAT IS THE PROPER APPLICATION OF THE NOTICE REQUIREMENTS IN CONTEMPT PROCEEDINGS UNDER RULE 42(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, A QUESTION WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT; AND B) MAY A CONVICTION FOR CONTEMPT BE SUSTAINED ON A CHARGE NOT MADE, OR WHERE IT APPEARS THAT THE CONVICTION COULD HAVE BEEN BASED ON CLEARLY NON-OBSTRUCTIVE CONDUCT, A QUESTION WHICH THE CIRCUIT COURT HAS DECIDED IN THIS CASE IN A WAY PLAINLY IN CONFLICT WITH DECISIONS OF THIS COURT?

A.

Only last term the Court in Taylor v. Hayes, ___ U.S. ___, 94 S. Ct. 2697 (1974), held that "before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard." (Emphasis added.) Taylor was a summary proceeding.

Eaton v. Tulsa, 415 U.S. 697 (1974), was a hearing on notice. There the Court announced the application to contempt charges of the rule in Cole v. Arkansas, 333 U.S. 196 (1948), namely, that a conviction may not be sustained upon a charge not made.

The conviction of Mr. Kunstler was on notice pursuant to a proceeding under Rule 42(b) of the Federal Rules of Criminal Procedure. The charges against Mr. Kunstler as tried before Judge Gignoux

were exactly as framed by Judge Hoffman, as follows: 32/

> "After the Court ruled, on February 2, that the Reverend Abernathy would not be permitted to take the stand, the Court ordered that Mr. Kunstler and the other attorneys and defendants not mention the name of the Reverend Abernathy in front of the jury. Mr. Kunstler not only defiantly indicated that he fully intended to violate that order, but in the middle of the direct testimony of the witness Lynskey, Mr. Kunstler actually brought the Reverend Abernathy into the courtroom and made a statement to the jury and physically embraced the Reverend Abernathy in front of the jury. This flagrant violation of the Court's order is reported as follows..." (Emphasis supplied.) 33/

There never was an order that Mr. Kunstler may "not mention the name of the Reverend Abernathy in front of the jury." The order was that he not "make any reference in front of the jury that they wanted Doctor Abernathy to testify."

The difference is of enormous importance in evaluating the facts in this case. Mr. Kunstler did indeed mention the name of Dr. Abernathy before the jury (which he had not been prohibited from doing) but in the portion of the record which is claimed as contempt he did not "make any reference in front of the jury that they wanted Doctor

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32/ The government was given leave by the Circuit Court to rephrase the charges, but failed to do so.

33/ 370 F. Supp. at 1338; Appendix, infra, p. 73a.

Abernathy to testify." Instead, he made a motion before the court that it reconsider its ruling.

The problems of procedural due process are brushed aside by the Circuit by the statement:

> "Since the specification quotes Judge Hoffman's orders verbatim, there could be no doubt what Kunstler was charged with violating. Therefore we are not sustaining the trial court by treating the conviction as a conviction upon a charge not made." 502 F. 2d at 816; App. 8a.

But the charge by Judge Hoffman is explicit and is not supported by, but rather contradicted by, the transcript. And the Seventh Circuit misses the point when it says that "there could be no doubt of what Kunstler was charged with violating." Is there no doubt?

Was he charged with violating an order not to mention the name of the Reverend Abernathy? Where is the order?

Was he charged with violating an order not to make any reference in front of the jury that they wanted Dr. Abernathy to testify? If so, where is the charge and where in Judge Gignoux' findings is he convicted of that?

Was he charged with "violating the court's order not to renew his motion in the presence of the jury," which is the convicting language of Judge Gignoux, 370 F. Supp. 1320? If so, where is that charge and where is that order? Where was he charged with "continuing argument after the Judge's repeated directions to stop," ibid., an item of which he was convicted by Judge Gignoux?

These are not frivolous questions, as suggested by the Seventh Circuit. They rather address two points which are important in the use of the contempt process, especially against lawyers:

a) Lawyers are of course required to abide by orders of the court, but they are also supposed to

have acute ears and they are not required to over-read those orders and eschew conduct which they believe is required for a proper defense of their client. And if there is doubt, they are supposed to err on the side of their duty to their client. They must also be sensitive to the dynamics of a trial and if an order has been effectively nullified by the court's own action, they are supposed to be aware of that. A cavalier reading of the charges ignores the nuances which often make the difference between a creative and a routine lawyer.

b) The uncertainty of what charge was made against Mr. Kunstler is of course directly related to the failure of Judge Gignoux and the Seventh Circuit to deal with the omitted 12 pages. For it is from those omitted pages it becomes clear that Judge Hoffman by his own conduct had vitiated the only order that he did make, i.e., "not to make any reference in front of the jury that they wanted Doctor Abernathy to testify."

The Court should accept the petition to clarify the notice requirements of Rule 42(b). Here the charge is followed by a long quotation from the transcript which is inconsistent with the charge. Does the mere recitation of the transcript become the charge? That appears to be directly in conflict with this Court's holding in Eaton v. Tulsa, supra, that a statement of the evidence at the contempt trial can never modify the charge itself. Is the situation different because the charge is followed by a transcript of evidence to be admitted at the trial? The use of references to a transcript does not satisfy the certification requirements of Rule 42(a), cf., United States v. Marshall, 451 F. 2d 372 (9th Cir., 1971). Are the notice requirements of Rule 42(b) to be similarly treated?

This Court has not defined the notice requirements of Rule 42(b), an important question in the administration of that rule, and this case would present an opportunity for the Court to clarify the requirements of the rule.

B.

Judge Gignoux' convicting findings were that Mr. Kunstler "violated the court's order not to renew his motion in the presence of the jury," 370 F. Supp. 1320. Since the record is barren of such an order, a fact which was called to the attention of the District Court and the Seventh Circuit, the appellate court shifted the grounds of the conviction. The Seventh Circuit states that Mr. Kunstler's motion to the judge was a violation of Judge Hoffman's earlier order not to mention that he wanted Dr. Abernathy to testify. 502 F. 2d at 816; Appendix, infra, pp. 7a-8a.

Regardless of the inaccuracy of the Circuit's reading of the record, the convicting statement of Judge Gignoux cannot stand as a matter of procedural due process, since the charge was not made, Eaton v. Tulsa, supra; nor may a reformulation of the finding by the appellate court correct this failure of procedural due process, ibid.

One further deficiency in Judge Gignoux' finding should be noted. The trial judge carefully separated this entire matter into two parts. Part I is clearly an In re McConnell, supra, situation, i.e., non-obstructive conduct by a lawyer. Reading Judge Gignoux' finding leaves one in doubt as to the extent to which the facts under Part I entered into his findings of guilt. "Since the record fails to 'negate the possibility' ... that the conviction was based solely on ..." lawful conduct, the conviction cannot stand. Eaton v. Tulsa, supra, fn. 3.

In Taylor v. Hayes, supra, the Court reaffirmed the requirements of procedural due process in lawyer contempt cases. By ignoring important procedural protections, both the District Court and the Circuit have created a dangerous precedent in this field which will have the inevitable effect of curbing the kind of vigorous advocacy upon which our legal system depends. In re McConnell, supra.

IV.

THE PETITION PRESENTS FOR REVIEW THE IMPORTANT QUESTION AS TO THE UNEQUAL ADMINISTRATION OF THE LAW, NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER DEFENSE COUNSEL CAN CONSTITUTIONALLY BE CONVICTED OF CONTEMPT WHERE THE GOVERNMENT PROCEEDS ON THE THEORY THAT THE CONTEMPT PROCESS IS TO BE EMPLOYED ONLY AGAINST DEFENSE COUNSEL AND NOT AGAINST PROSECUTORS GUILTY OF THE SAME ACTS OF WHICH DEFENSE COUNSEL WERE CONVICTED.

The time is long since overdue to correct the inexcusable practice of lower courts in contempt prosecutions of prosecuting defense counsel but protecting government lawyers regardless of what they do. The recent study by the Association of the Bar of the City of New York, Disorder in the Court, supra, emphasized the fact that although--

> "Contempt is theoretically available against prosecutors ... contempt citations have in fact not been used for this purpose. Two thorough studies of cases going back at least twenty-five years have failed to uncover a single instance in which a prosecutor was punished for contemptuous courtroom behavior. Two cases were found in which trial courts held prosecutors in contempt for their courtroom statements, but both decisions were reversed on appeal. There are other cases in which appellate courts have suggested that a prosecutor should have been held in contempt, but these have customarily come to nothing." (p. 186.) 34/

34/ Since the preparation of that report, there is another case of a conviction of a prosecutor in a trial court, reversed on appeal. Weiss v. Burr, 484 F. 2d 973 (9th Cir., 1973).

Judge Jerome Frank in his opinion in United States v. Antonelli, 155 F. 2d 631, 661-2 (2d Cir. 1946), pointed out the price that is paid for the "ceremonious ... ritualistic verbal spanking" that is administered to misbehaving government attorneys while the court convicts their victims:

> "The practice ... breeds a deplorably cynical attitude towards the judiciary."

And Judge Frank continued:

> "If this court really meant business about such behavior as that of government counsel in the case at bar, if it actually considered such behavior reprehensible, it would, at a minimum, announce that if, in any future case any government lawyer should thus conduct himself, it would deprive him of the right to practice in this court and would recommend that he be removed from his office as a representative of our government." Ibid.

The case now before this Court is a classic example of the abuse complained of by the report of the Association of the Bar of the City of New York. Because of Judge Gignoux' assumption arguendo, we have a clear case where the prosecutors are guilty of the same contempts of which defense counsel was convicted. The class -- defense counsel -- was singled out for selective and discriminatory prosecution in violation of the fundamental Constitutional principles enunciated in Yick Wo v. Hopkins, 118 U.S. 356 (1886). Government counsel were not prosecuted because they were government counsel, not defense counsel. Defense counsel were prosecuted because they were defense counsel, not government counsel. This is invidious discrimination prohibited by Yick Wo.

Selectivity having been shown, the government

had the burden of justifying the discrimination. It did not even attempt to justify it. The government candidly admitted on the appeal to the Seventh Circuit that it applied different standards to defense counsel and prosecutors and does not believe that contempt need be used against prosecutors.

The notion that prosecutors may be deterred by reversal of convictions but defense counsel must be deterred by convicting them of crime, or perhaps disbarring them, is no excuse for prosecuting defense counsel and not prosecuting prosecutors. Indeed, it is the most candid confession of disparate treatment and discriminatory prosecution that we have ever read -- precisely the "unjustifiable standard for selectivity" forbidden by this Court in Yick Wo.

The Circuit Court, quoting Judge Gignoux, dealt with this as a question of burden of proof, placing on defendants the obligation of making "a satisfactory showing that the 'United States, on behalf of the [anti-riot act] court, has pursued the present prosecution for discriminatory and unconstitutional purposes.'" In re Dellinger, 502 F. 2d at 817.

But in this case Judge Gignoux "assumed arguendo" the discriminatory prosecution. The discriminatory purpose was admitted by the government when it asserted that it uses the contempt power only against defense lawyers.

We suggest that the selectivity practiced here is especially egregious because a) the invidious discrimination is in favor of government officials, thus putting in issue the entire question of respect for the law by its enforcers, and b) since the proceeding is one of contempt, it is being prosecuted in the name and on behalf of the court.

Any effort by the judicial branch of the government to use the contempt process to control lawyer conduct must necessarily fail to gain the confidence

of the bar and the public if it is one-sided. In view of the notoriety of this case, the recorded misconduct of government counsel, and the frank admission by the government that it proceeds only against defense counsel, it is particularly important that the Court accept this petition and address the issue of discriminatory prosecution.

V.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION NOT HERETOFORE DETERMINED, NAMELY, WHETHER A CONTEMPT IS GOVERNED BY THE RULE OF ALDERMAN v. UNITED STATES, REQUIRING DISCLOSURE OF UNLAWFUL ELECTRONIC SURVEILLANCE TO A DEFENDANT HAVING STANDING AND DENYING TO A COURT THE POWER TO MAKE EX PARTE DETERMINATION OF RELEVANCE AFTER IN CAMERA INSPECTION.

Electronic surveillance issues have plagued the "celebrated" Chicago conspiracy case from the beginning. It was in this case that former Attorney General John Mitchell first enunciated his claim of executive power to override the Fourth Amendment and revealed the existence of a massive electronic surveillance program. It took three years before the Supreme Court in United States v. United States District Court, 407 U.S. 297 (1972), rejected his contentions and declared the entire program illegal.

A.

The opinion of the Seventh Circuit is written as if this Court had never issued its opinion in Alderman v. United States, 394 U.S. 165 (1969), unsuccessfully sought to be modified by the government in United States District Court, supra, 407 U.S. at 324, n. 21.

Alderman unequivocally states that in a criminal prosecution a defendant who has standing may require the disclosure to him of unlawful electronic surveillance and that the trial court shall not engage in the process of in camera inspection of unlawful material for the purpose of determining relevance. In this case, standing and illegality were conceded; therefore, there was nothing left, under Alderman, but to turn over the logs and hold a taint hearing.

Despite Alderman's clear prohibition of in camera inspection, Judge Gignoux made numerous in camera inspections, as did the Circuit Court. These inspections are referred to by the Circuit Court, 502 F. 2d at 818-19, Appendix, infra, pp. 16a-22a. The point relied upon by Judge Gignoux and seemingly adopted by the Circuit Court is that Alderman does not apply because the basis of the proceeding here was what transpired at the trial, and the Circuit Court, after inspecting the wiretaps in camera, concluded "in no sense can the transcript of that trial be considered the fruit of any illegal surveillance." 502 F. 2d at 819, Appendix, infra, p. 22a.

But petitioners argued that the entire proceedings at the trial included "baiting" alleged contempts and that these episodes were the "fruit" of unlawful surveillance. Alderman forbids the court from making an ex parte determination of this issue. Neither Judge Gignoux nor the Circuit Court can appraise ex parte:

> "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life."
> Alderman, supra, 394 U.S. at 182.

Despite Alderman, both Judge Gignoux and the Circuit Court placed the burden on the defendants to rebut the government's argument that "the Government's evidence could not have been derived from the overhearings" (502 F. 2d at 819, Appendix, infra, p. 19a). It is a remarkable tour de force to insist that a litigant, who has been denied access to material, blindly rebut an argument that it is not relevant. In Alderman, this Court expressly rejected that hopeless method and required the government to disclose the material to the defendants to enable them to meet the government's arguments. Alderman requires that reliance be placed on the adversary process instead of on the government's in camera disclosures. 35/ Here the lower courts simply failed to follow Alderman.

B.

Non-adversary proceedings may well permit a court to be misled because it does not have the benefit of the input of opposing counsel. Nothing reveals that more clearly than the Circuit Court's opinion. The following is stated at 502 F. 2d at 818, Appendix, infra, p. 17a:

> "The Government turned over to Judge Gignoux for his in camera inspection logs of all overhearings requested by defendants' disclosure motion."

That simply is not the fact, as the Circuit Court

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35/ Indeed, the only explicable difference between the Circuit's decision in Seale and in the instant case is that upon in camera inspection it determined in the former case that the surveillance was "arguably relevant," and here it was not, precisely the determination which Alderman prohibits the court from making with an adversary hearing.

would have recognized had the Alderman adversary process been followed.

Petitioners sought disclosure of electronic surveillance of themselves, their counsel and their staff of legal assistants, whose names and addresses were all set forth in the motion. The government did not turn over to Judge Gignoux "all overhearings requested by defendants' disclosure motion." It says it turned over electronic surveillance of defendants and their counsel of record; but not the defense staff, who were the critical people who staffed the defense office, and other attorneys who played important roles but were not of record. 36/ Through the non-adversary process

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36/ Because of a disclosure made by the government in another case (Kinoy v. Mitchell, S.D.N.Y. Civ. Action No. 5698/70), we know that Arthur Kinoy, a defense counsel not of record, was subjected to electronic surveillance at least 23 times, most of which were concededly unlawful (the government is still claiming that nine overhearings of Mr. Kinoy were lawful because they allegedly involved foreign surveillance). Some of these overhearings occurred after the indictment and shortly before the Chicago trial when Mr. Kinoy was engaged actively in discussion of trial strategy.

We do not know the relevance of these overhearings to this case (because we still do not have the transcripts of the overhearings), but we do know that they were not turned over in this case even for in camera inspection, which means that, contrary to Alderman, somebody in the Department of Justice is preempting the responsibility of determining relevance. But Mr. Kinoy was only one of a number of consulting attorneys not of record as to whom demand was made for wiretaps. Additionally, disclosure was demanded for the 25

the Circuit Court overlooked this point, and made a serious error.

It also unwittingly adopted the language of Mr. Mitchell's order of July 14, 1969, without considering its defects. The Circuit Court's opinion says (502 F. 2d at 818): "[T]he surveillances were cut off in accordance with the July 14, 1969, instructions of the Attorney General."

The Circuit Court has simply fallen into the government's deliberately phrased trap about the former Attorney General's instructions. A careful reading of the Mitchell memorandum shows that in fact it required a continuance of the electronic surveillance program, which the Mitchell memorandum itself acknowledges made surveillance of at least the defendants and their attorneys likely, if not inevitable. The memorandum required discontinuance only as to specific persons, to wit, the eight defendants and their counsel of record. It specifically required all other existing electronic surveillance, including such as may have been ongoing with respect to the defense staff and office, and other attorneys, to be continued. Further, to the extent it directed discontinuance, it did so only after one of the parties to the conversation was identified by the agent as one of the specified individuals. Thus, even were Mitchell's directive followed to the extent of the limited discontinuance prescribed, it is clear that a reasonable, if not considerable, likelihood exists that overhearings occurred of members of the legal staff and counsel other than those of record; that overhearings

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legal workers who staffed the defense office and did investigation for the defense attorneys. How many additional overhearings occurred which may or may not be relevant will never be known without disclosure and any adversary hearing.

occurred of the specified defendants and their counsel in conversations in which they did not, or until they did, identify themselves to a party; and that overhearings of conversations of other persons occurred which had as their goal or result the acquisition of knowledge concerning defense personnel and/or strategy. Thus the government's response is far from the specific denial required by this Court in Gelbard v. United States, 408 U.S. 41 (1972).

It was not even contended that the defendants would not have standing to obtain unlawful electronic surveillance of their legal staff and attorneys not of record, under the most elementary Sixth Amendment principles. Yet the entire process of accepting the government's ambiguous and unresponsive denials, of taking in camera whatever the government submits, and making its own ex parte evaluation of what the government provides without allowing adversary comment thereon, allowed all of the more subtle nuances of surveillance to fall by the wayside and led the Circuit Court into the kind of erroneous statements that it made in its opinion.

It is particularly important that the Court accept this petition and address the issues of electronic surveillance which are presented.

VI.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER AS A MATTER OF PUBLIC POLICY THE CONTEMPT POWER IS AVAILABLE TO PUNISH THE TARGETS OF JUDICIAL AND PROSECUTORIAL MISCONDUCT WHICH WAS OF SUCH AN EXTRAORDINARY AND PERVASIVE NATURE AS TO CAUSE A BREAKDOWN OF THE JUDICIAL PROCESS.

It is settled law that provocation is no defense to

contempt, Illinois v. Allen, 397 U.S. 337 (1970), and petitioners do not contend for a contrary rule.

But the question remains whether that rule governs this case or whether the facts in this case are so extreme as to bring into play other objectives of the judicial system which would limit the universal application of such a rule.

Every review of the contempt power has emphasized that, "in view of the heightened potential for abuse posed by the contempt power," Taylor v. Hayes, supra, 41 L. Ed. 2d at 908, "the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper," Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451 (1911). The absence of all the safeguards accompanying an ordinary criminal case underscores the need to regulate carefully the use of the contempt power. Offutt v. United States, 348 U.S. 11, 14 (1959); see also, In re Michael, 326 U.S. 224, 227 (1945); Nye v. United States, 313 U.S. 33, 49 (1941).

And what is the function of the contempt power that has justified departure from the normal process of criminal trials provided for under the Constitution? It is only "that the necessities of the administration of justice require such summary dealing with obstruction to it," Offutt, supra, 348 U.S. at 14. That, of course, is why the courts have insisted that in order for conduct to be contempt it must be not merely misbehavior but must amount to an "actual obstruction of justice," In re McConnell, supra. In other words, the contempt power is not a power to punish behavior unless it results in obstruction of a judicial proceeding and when it is "the least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat. 204, 231 (1821).

It is precisely because the contempt is so threatening that the proceedings which are to be protected

by its exercise from obstruction must essentially have those characteristics which merit the employment of this extraordinary power.

The Seventh Circuit in Seale said that errors by the trial judge do not excuse contempt (461 F. 2d at 362) and in Dellinger that "impropriety on the part of the trial judge cannot justify or excuse contemptuous conduct" (461 F. 2d at 401).

It is obvious from his opinions that Judge Gignoux read the foregoing comments as placing a straitjacket upon him so that, without regard to the extraordinary findings that he made as to the breakdown of the judicial proceeding, and from which he concluded that punishment was inappropriate, he nevertheless was required to find guilt.

Petitioners, as stated above, do not contend for a rule of law that error or even impropriety by a trial judge excuses contemptuous and obstructive conduct by a defendant or counsel.

We do, however, contend that when misconduct by a trial judge and a prosecutor has become so pervasive that it can no longer be said that the trial constitutes "a functioning of our judicial system," Bloom v. Illinois, 391 U.S. 194, 207 (1968), then the contempt process is no longer available for the reason that the very basis for the existence of this extraordinary power has evaporated. Moreover, to employ the contempt process in such a situation, considering the recognized dangers of its use, serves only further to undermine the public's confidence in the integrity of the judicial system. To use the contempt power under those circumstances makes clear that it is not the administration of justice that is being protected; it is rather the personality of a judge that is being assuaged and the result is to "engender resentment, suspicion, and contempt" for the courts, Bridges v. California, 314 U.S. 252, 271 (1941).

We readily acknowledge that in some cases it

might be difficult to draw a line between the application of the rule that simple provocation does not excuse contempt and the rule which we submit applies in this case. But the unusual and, we submit, unique status of the record in this case eliminates any such difficulty.

The Seventh Circuit's conclusion that "the demeanor of the judge and prosecutors would require a reversal if other errors did not," 472 F. 2d at 391, followed a massive documentation which established judicial impropriety, bias, and "contempt for the defense," as well as equally egregious conduct by the prosecutor.

Judge Gignoux at the conclusion of four weeks of testimony in which he heard from persons whose testimony was in no way reflected in the prior record (e.g., Charles Garry and Bobby G. Seale), independent observations by distinguished lawyers, jurists, and newspaper reporters, and selected tapes of what had actually occurred before Judge Hoffman, arrived at the conclusion that the record before him "amply support[s] these findings by the Court of Appeals," 370 F. Supp. at 1321.

Several important points, however, emerge from Judge Gignoux' opinion which add to the dimensions of this matter as delineated in the Seventh Circuit's opinion in the substantive case, 472 F. 2d 340.

a) The pervasiveness of the misconduct by the trial judge and prosecutors was largely indicated in the substantive opinion.

b) The actual breakdown of the judicial process was recounted by Judge Gignoux when he said that "on a number of occasions the trial so completely disintegrated that it could not be said that a judicial proceeding was in progress," 370 F. Supp. at 1321. And see his statements with respect to October 30, 1969 and February 4, 1970, id. at 1311 and 1312. He

further found that the defendants were not responsible for the breakdown, ibid. In those specific situations he concluded that no conduct of the defendants was punishable as contempt because no judicial proceeding was underway.

c) The causal impact of Judge Hoffman's conduct on the charges of which appellants were convicted was found as a fact by Judge Gignoux. He held that, with the exception of the two judicial robes charges, petitioners' conduct could "in each instance reasonably be said to have been in response, albeit an excessive response, to peremptory action of the judge" (370 F. Supp. at 1321; emphasis added).

Faced with the implication of his findings --pervasive misconduct of judge and prosecutors, causing a breakdown of the judicial process --Judge Gignoux felt that he could satisfy the imperatives of justice by separating out particular occasions when the trial obviously broke down and entering acquittals as to incidents occurring at those specific occasions, while adjudicating conviction without punishment as to the remainder. He saw that as the only way of adhering to a rule of "provocation is no defense" while at the same time paying heed to what the record here revealed as to the breakdown of the process. The difficulty with Judge Gignoux' approach is that he did not recognize that on the basis of his own findings the entire case was so infected by prosecutorial and judicial misconduct that there was no judicial proceeding during the entire trial upon which a conviction for contempt could be sustained.

Judge Gignoux' method of handling the incidents of the other days --conviction without punishment-- postulates a gap between "law" and "justice." Such a gap, bad in any field of law, is self-destructive in the field of contempt of court because it inevitably

raises the question whether the contempt power was allowed to be employed not for the purpose of vindicating the judicial process but rather to convict "for the record" victims of an abuse of that process.

There are alternate approaches within the recognized body of the law of contempt to which the lower court could have turned to reach the just result. Plainly, judicial misconduct may reach such a level that it cannot be said that parties responding thereto have the intent necessary for criminal contempt; or, since obstruction is an essential element of the crime, it is clear that the trial was obstructed not by the petitioners, but by the judge and prosecutor. Heretofore, courts faced with sufficient judicial misconduct have found no difficulty in reversing contempt convictions on either of the foregoing analyses. See, Schlesinger v. Musmanno, 367 Pa. 476, 81 A. 2d 316 (1951); People v. Pearson, 240 N. E. 2d 337 (Ill. App., 1968); In re Abse, 251 A. 2d 655 (D. C. Ct. of App., 1969).

We doubt that there will ever be a trial where the circumstances calling for acquittal on the grounds of prosecutorial and judicial misconduct are stronger than here. The "least possible power adequate to protect the end proposed" (Anderson v. Dunn, supra) in this case is no power.

In Offutt, supra, 348 U.S. at 14, this Court spoke of the "extraordinary power" of contempt as necessary to vindicate the "majesty of the law." We submit that the "majesty of the law" prohibits a ruling that the contempt power is available so that the malefactors may penalize their victims.

There are occasions where "the conduct of law enforcement officials is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction," United States v. Russell, 411 U.S. 423, 431-32, per Rhenquist, J. This is such a case, and the law enforcement officials were the judge and prosecutor.

## CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment and opinion of the court below.

Dated:
December 6, 1974.

Respectfully submitted,

MORTON STAVIS
DORIS PETERSON
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Counsel for all Petitioners

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| No. 73-2107 | : | Appeal from the |
| | : | United States |
| In the Matter Of; | : | District Court |
| DAVID T. DELLINGER, | : | for the North- |
| ABBOTT H. HOFFMAN, | : | ern District of |
| JERRY C. RUBIN and | : | Illinois, East- |
| WILLIAM M. KUNSTLER, | : | ern Division. |
| | : | No. 72 CR 925 |
| Defendants-Appellants. | : | EDWARD T. GIGNOUX, Judge. |

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HEARD APRIL 22, 1974--
DECIDED SEPTEMBER 6, 1974

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Before FAIRCHILD, CUMMINGS and PELL, Circuit Judges.

CUMMINGS, Circuit Judge. This appeal is from the second criminal contempt adjudication resulting from incidents occurring during the celebrated "Chicago 7" Anti-Riot Act conspiracy trial. The substantive convictions were reversed. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), certiorari denied, 410 U.S. 970. We also reversed the original contempt convictions. In Re Dellinger, 461

F.2d 389 (7th Cir. 1972).

Pursuant to 28 U.S.C. §292, the Chief Justice of the United States thereafter designated District Judge Gignoux to try the contempt case.[1/] On the remand various pre-trial motions were denied. In re Dellinger, 357 F.Supp. 949 (N.D. Ill. 1973). At the trial, the Government's case-in-chief consisted of the introduction of the transcript of the Anti-Riot Act trial. After the Government rested, the district court acquitted John Froines and Lee Weiner and dismissed a number of contempt specifications against the remaining defendants in an unreported memorandum opinion dated November 6, 1973. The defendants' renewed motion to dismiss was denied in the same opinion. Thereafter, the remaining defendants testified

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1/ The original contempt convictions were summary adjudications. Those now under review were imposed after a full trial.

in their own behalf. In rebuttal the Government offered evidence to refute testimony of a defense witness that the "defense camp" had been subjected to surveillance by military intelligence officers during the Anti-Riot Act trial. At the close of all the evidence, defendants Leonard Weinglass, Rennard Davis and Thomas Hayden were acquitted. Judgments of acquittal were also entered as to several of the contempt specifications against the remaining defendants. The district court found David Dellinger, Abbott Hoffman, Jerry Rubin and William Kunstler guilty of various other contempts but did not impose any fines or sentences. In re Dellinger, 370 F.Supp. 1304 (N.D. Ill. 1973).

Whether Lawyer Kunstler Was Contemptuous.

The first argument on appeal is that Kunstler's conduct described in Kunstler specification VI does not constitute con-

tempt of court. This specification is set out at 370 F.Supp. 1337-1338[2/] and need not be quoted herein. The matter complained of in specification VI consisted of an extended outburst from Mr. K stler, one of the attorneys for the defendants, after Judge Hoffman, the trial judge in the conspiracy case, refused to relieve Kunstler of his commitment to conclude his case with the testimony of an authenticating cameraman, plus certain documents. Thus Mr. Kunstler was prevented from presenting the Reverend Ralph Abernathy as a witness for the defendants.

We agree with Judge Gignoux that the extent and violence of Kunstler's diatribe and the bitterness and anger displayed "constituted a vicious personal attack on the judge which could only have

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2/ In reproducing specification VI in 370 F.Supp., the words "The Court" were inadvertently omitted from the ninth line of the specification.

served to vent his spleen." 370 F.Supp. at 1319. In no way can Kunstler's remarks be considered as merely heated legal argument and therefore non-contemptuous. Because of the extreme nature of the attack on the trial judge, the remarks of counsel created an imminent prejudice to a fair and dispassionate proceeding, thus constituting an actual and material obstruction of the judicial process. See 461 F.2d at 400. Moreover, as the trial judge found, Kunstler's conduct "resulted in an entirely unnecessary and not insignificant delay and disruption of the proceedings" (370 F.Supp. at 1320), reinforcing his holding that there was an actual and material obstruction of the administration of justice. Before concluding with respect to this specification, it should be noted that at their close, Kunstler's remarks predictably precipitated shouts of

"right on" and applause, again satisfying obstruction standards.[3/] 461 F.2d at 399-400.

Kunstler's specification VII (reproduced at 370 F.Supp. 1338-1341) is also said not to constitute contempt of court. After Judge Hoffman had ruled that Reverend Abernathy not be permitted to take the stand, he ordered defense counsel not to make any reference before the jury to the fact that defendants wanted Abernathy to testify. Kunstler replied he would not abide by such a ruling and therefore would have to be sent to jail. Despite the trial judge's order, when Dr. Abernathy arrived Kunstler said he would like to put him on the stand. Kunstler contin-

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3/ Kunstler's remarks were also larded with interruptions of "Voices: Right On," but we do not rely on these interruptions in view of defendants' representation that the trial tapes show they were in a single soft voice emanating from a defendant or someone present at defense counsel's table. No such representation has been made with respect to

(fn. cont. next page)

ued to mention Dr. Abernathy's name and hugged him before the jury. The facts under this specification are clearly contempt because Kunstler violated a court order. Further, he obstructed justice by putting before the jury information that had been ruled inadmissible, making it more difficult for the jurors to decide the case according to the law as interpreted by the district judge. As we previously held, lawyers are required to obey even incorrect orders; the remedy is on appeal. 461 F.2d at 398.

Kunstler argues that because he got away with violating it once, there was no longer an operative order prohibiting his mentioning Dr. Abernathy to the jury. In our judgment, this is frivolous. Kunstler's renewal of his motion to call Dr. Abernathy

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(fn. cont. from preceding page)
the applause and shouts at the conclusion of Kunstler's comments.

as a defense witness in the presence of the jury and his persistent arguments after being directed to stop clearly violated Judge Hoffman's orders to make no reference before the jury to the fact that he and his colleagues wanted Dr. Abernathy to testify and not to renew his motion. Since the specification quotes Judge Hoffman's orders verbatim, there could be no doubt what Kunstler was charged with violating. Therefore, we are not "sustaining the trial court by treating the conviction as a conviction upon a charge not made." Eaton v. City of Tulsa, ___U.S. ___, 42 LW 3538; see also Taylor v. Hayes, ___U.S.___, 42 LW 5180, 5183-5184.

Whether Messrs. Dellinger, Hoffman and Rubin Were Contemptuous.

The non-lawyer defendants contend that the nine specifications involving statements made by them at the Anti-Riot Act trial and the two specifications in-

volving wearing judicial robes by Abbott Hoffman and Jerry Rubin do not constitute contempt.

The statements in question delayed the trial, thereby satisfying the obstruction requirement. Although in some of the specifications, one or two sentences may have been justified, each specification contained an extended colloquy not required by the circumstances. As Judge Gignoux stated with respect to Dellinger IV (reproduced at 370 F.Supp. 1327), in light of the extent of these Dellinger comments at the Anti-Riot Act trial and their offensive character, he knew or should have known that his conduct was wrongful, and his interruptions "so disrupted the course of the proceedings that an unnecessary and not insubstantial delay ensued." 370 F.Supp. at 1312. Similar permissible findings were made with respect to Dellin-

ger V, VI, VII, VIII, IX and X (reproduced at 370 F.Supp. 1328-1335, 1341-1342).

As to Abbott Hoffman's specification VI and Jerry Rubin's specification V (reproduced at 370 F.Supp. 1344-1347), the district court was justified in concluding that these defendants' persistent interjections occasioned a substantial delay in the progress of the proceedings and constituted misbehavior in the presence of the court. 370 F.Supp. at 1314-1315.

Hoffman specification VII and Rubin specification VI (set out at 370 F.Supp. 1347-1348) involved the wearing of judicial robes by those defendants at the February 6th morning session of the Anti-Riot act trial. As the district court found, the Anti-Riot Act trial transcript disclosed that this conduct occasioned an entirely unnecessary and not insignificant delay in the proceedings. 370 F.Supp. at

1315. The seriousness of this misbehavior supported the district court's conclusion that the conduct constituted an actual and material obstruction of the administration of justice. See United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972).

Imposition of Sentence on Mr. Kunstler Was Unrequired.

Defendant Kunstler asserts that Judge Gignoux could only acquit or dismiss the charges and not convict him without imposing a sentence. This is a misapprehension of the law. A judge trying a criminal contempt case may find violations and nevertheless impose no sanctions. See United States v. Dickinson, 465 F.2d 496, 513 (5th Cir. 1972). We see no reason why the judge must dismiss to achieve this result, though that option is open at least to the court which initiated the contempt proceeding. See United States v. Barnett, 346 F.2d 99 (5th Cir. 1965) (en

banc). Whether or not we disagree with the non-sentence is immaterial, for the trial judge was within his rights in convicting but refraining from imposing punishment.

Kunstler attaches significance to the fact that the trier of contempt adverted to "the potentially grave consequences of a criminal contempt conviction to a member of the bar" (370 F.Supp. at 1322). This remark simply recognized a factual possibility over which the judge had no control; it certainly does not amount to an exercise of disciplinary powers nor an invitation for disciplinary proceedings to be commenced in the New York courts. Therefore, the district court did not exceed its criminal contempt power in this respect.

Conduct of Conspiracy Judge and Prosecutors Does Not Necessitate Reversal.

Defendants contend that the conduct

of the judge and prosecutors at the Anti-Riot Act trial requires dismissal for their contempt. We have twice rejected this contention in the Seale and Dellinger contempt cases. See 461 F.2d at 361-363, 401. Nothing in this contempt trial persuades us to alter our prior conclusion for provocation, however shocking, is no defense to contempt.

Adequacy of Falk-type Hearing.

Defendants urge that their motion to dismiss should have been granted under United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc) because the Anti-Riot Act prosecutors were not also charged with contempt. In its unreported memorandum opinion overruling defendants' motion to dismiss, the district court refused to apply Falk because defendants failed "to support their allegation that the prosecution of the present charges amounts to a discri-

minatory and unconstitutional prosecution" The court then concluded that defendants had not made a satisfactory showing that the "United States, on behalf of the [Anti Riot Act] court, has pursued the present prosecution for discriminatory and unconstitutional purposes." Judge Gignoux reaffirmed these findings at the close of the evidence (Tr. 4150).

Defendants' reliance on Falk is misplaced. That case was remanded so that the defendant could have a hearing on his claim of selective prosecution. Here such a hearing took place when United States Attorney Thompson gave more than fifty pages of testimony on this subject. His account satisfied the district court and now us that the Government had a rational basis for prosecuting the case. No further hearing is needed.

Electronic Surveillance

Defendants assert that the Government's electronic surveillance of defendants and their counsel should have been disclosed to them before trial, and that there should have been an evidentiary hearing with respect to the impact of the surveillance. In the district court, the Government agreed to turn over to defendants any such material which might infringe defendants' Sixth Amendment right to counsel, any such material that might be exculpatory under Brady v. Maryland, 373 U.S. 83, and any material disclosure of which was required by Alderman v. United States, 394 U.S. 165, 357 F.Supp. at 957, 960, n.14.[4/] Our order of May 1, 1973, in denying defendants' April 18, 1973 petition for writ of manda-

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4/ Because of Judge Gignoux' decision in its favor, the Government abandoned its initial undertaking to turn over Alderman material to defendants.

mus with respect to electronic surveillance, was fashioned to enforce the first two parts of this governmental undertaking. However, no such material was discovered. As the United States Attorney for the Northern District of Illinois advised Judge Gignoux and defendants on May 23, 1973:

> As in the past, we recognize our obligation to turn over any surveillance that can be classified as exculpatory or capable of infringing upon the sixth amendment rights of these defendants to defend against the pending contempt charges. However, we are presently unaware of any surveillance material that can be so classified.

Brady v. Maryland does not entitle defendants to an adversary hearing with respect to such materials.

In accord with acceptable procedure,[5/] government counsel furnished the district court with an affidavit that there was no

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5/ See Korman v. United States, 486 F.2d 926, 931 (7th Cir. 1973).

surveillance of defendants or their counsel during the period of their 1969 Anti-Riot Act trial. The district court and we in turn have found that the overhearings submitted *in camera* show no communications between defendants and their counsel during, before and since that trial. See 357 F.Supp. at 960, n.15.

The Government turned over to Judge Gignoux for his *in camera* inspection logs of all overhearings requested by defendants' disclosure motion. See 357 F.Supp. 957, n.12 and 960, n.15. Subsequently, the Government turned over to the district judge additional logs in which defendants Froines' and Davis' voices were identified, after which the surveillances were cut off in accordance with the July 14, 1969, instructions of the Attorney General.[6/] After

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6/ From our examination of the logs, it is apparent that, consistently with the Attorney General's instructions, the wiretapping ceased when defendants or their counsel were identified.

the oral argument before us, in accordance with our order of May 7, 1974, the Government supplied still additional logs to us for in camera inspection. These included Anti-Riot Act trial period communications of Messrs. Davis and Dellinger that had not been discovered until after the district court's judgment. Although some of the defendants were overheard in those logs, the logs have nothing to do with the Anti-Riot Act or contempt cases.

The district court held that Alderman v. United States, 394 U.S. 165, did not require an evidentiary hearing to determine the relevancy of the logs because the Government was relying on the transcript before Judge Hoffman to show defendants contempts. Therefore, the Government's evidence could not have been derived from the overhearings. 357 F.Supp.

at 958-960.

To rebut this reasoning, defendants assert that the logs might have helped in their defense of lack of intent. We have examined all the logs; none of them relates to defendants' intent. This case is therefore distinguishable from the Seale case where one of the logs "was a link in a communication from a lawyer to Seale advising him with respect to his conduct in court." 461 F.2d at 364. Seale could use the log on remand to show his state of mind and motivation at the time of the conduct, so that a taint hearing was necessary. 461 F.2d at 365-366. Here, on the other hand, no such overhearings occurred. Furthermore, if a log with respect to defendants' lack of intent had been uncovered, the Government was obliged to tender it to defendants in accordance with its express undertaking

(357 F.Supp. at 960, n.14), which this Court further obligated the Government to follow in our order of May 1, 1973.

Defendants rely on United States v. Huss, 482 F.2d 38 (2nd Cir. 1973). There government informer Siegel had been overheard illegally by the United States on six different occasions. When the Government attempted to use Siegel as a witness at the criminal trial of two others, he refused to testify despite an immunity grant. He successfully relied on the Second Circuit rule that the Government cannot rely on testimony of a witness discovered through illegal taps. The civil contempt order entered against him was vacated because the Government's destruction of the tapes of his overheard conversation prevented disclosure and an Alderman hearing. No comparable situation is presented here where these defendants

were tried for their misconduct in open court rather than for any refusal to testify. Here the Government is not relying on possibly tainted evidence, so that Huss is inapt.

Defendants have relied on Dellinger v. Mitchell, Civil Action No. 1768-69 (D. D.C.) and their in camera disclosures to us growing out of that pending case to buttress their electronic surveillance arguments. Our review of that material and of Mr. Kunstler's affidavit concerning United States v. Means, 374 F. Supp. 321 (D.S.D) and Judge Nichol's opinion denying defendants' motion to dismiss therein 7/ do not persuade us that the Government has misrepresented the status of the wiretaps here. Nothing in any of the wiretaps supports defendants' assertion

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7/ The opinion was filed with us by defendants on April 22, 1974.

that the Government thereby molded its approaches to create a picture of disruption by defendants at the Anti-Riot Act trial. In no sense can the transcript of that trial be considered the fruit of any illegal surveillance.

As the district court held, the limited nature of the evidence offered by the Government "precludes the possibility that it could be inadmissible because the produ of any illegal interception." 357 F.Supp. at 961. Since the evidence offered did not and could not have come from any electronic surveillance, disclosure of the electronic surveillance records to defendants and an Alderman hearing were unnecessary.

Quashing the Subpoenas to the Army and the Federal Bureau of Investigation.

In an attempt to show that the Government had harassed the defense during the Anti-Riot Act trial, defendants introduced the testimony of John O'Brien,

a former military intelligence agent. We have reviewed that testimony and are satisfied that Judge Gignoux could reasonably conclude, as he did, that Mr. O'Brien's testimony should be rejected as "utterly incredible."

In order to attempt to corroborate O'Brien, the defendants served subpoenas on Brigadier General Patton, Deputy Chief of Military Intelligence of the Army, and on Richard G. Held, the Agent in Charge of the FBI's Chicago office. In general, these subpoenas called for all of O'Brien's reports from March 1969 to March 1970 as well as reports of others possibly engaged in surveillance of defendants and their counsel. The FBI filed an affidavit that none of the subpoenaed reports could be found in its search. A similar certificate was filed by the Army. However, both agencies submitted documents in camera

to Judge Gignoux. After examining the documents, the district court concluded that "the submissions both submitted by the Federal Bureau of Investigation and by the Pentagon contained no reports, records or other material which in any way related to any surveillance of the defendants or their counsel during the period March, 1969, to March, 1970, or which in any way are material or relevant to any of the issues before the Court in the present proceeding" (Tr.4156). The Government's motions to quash the subpoenas were therefore granted.

In view of the court's finding that none of the submitted material was relevant or material, it was permissible to quash the subpoenas. See United States v. Escobedo, 430 F.2d 603, 610, n.7 (7th Cir. 1970); 2 Orfield, Criminal Procedure under the Federal Rules §17:82 at 666

((1966). The district court also refused to grant the defendants' motion for an order compelling General Patton and Mr. Held to testify. Because of the affidavits of the records custodians that the desired search had been made, there was no necessity to receive testimony from them. In fact, Rule 27 of the Federal Rules of Criminal Procedure was designed to obviate such testimony.[8/] United States v. Rogers, 454 F.2d 601, 605 (7th Cir. 1971). Furthermore, the refusal to compel testimony from General Patton and Mr. Held was supported by the court's finding that defendants had not made the requisite "showing of illegal surveillance or infiltration of the defense camp."

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8/ Rule 27 incorporates by reference Rule 44 of the Federal Rules of Civil Procedure. Rule 44(b) authorizes the receipt of appropriate written statements as evidence that the records do not contain requested materials.

Since the district found on the basis of the entire record beyond a reasonable doubt that "there was no surveillance, infiltration or intrusions into the councils * * * of the defense during the period of these [Anti-Riot Act] proceedings; that is between March of 1969 and March of 1970" (Tr.4153), we conclude that its rulings as to the subpoenas and the custodians of the documents were correct.

Right to a Jury Trial.

Defendants have renewed their contention that they were entitled to a jury trial. At a pretrial conference the district judge granted the Government's motion to limit the maximum sentence imposable against each defendant to 177 days imprisonment. See 357 F.Supp. at 955. Since this meant that no defendant would serve more than six months' imprisonment, a jury trial was unnecessary in accordance

with our holding on the prior contempt appeal. 461 F.2d at 397; see also Taylor v. Hayes, ___ U.S. ___, 42 LW 5180, 5183; Codispoti v. Pennsylvania, ___ U.S. ___, 42 LW 5175, 5177; United States v. Seale, 461 F.2d 345, 356 (7th Cir. 1972).

Defendants insist that they were entitled to a jury trial as a matter of discretion even if not as a matter of right. For the reasons articulated by Judge Gignoux (356 F.Supp. at 956), there was no abuse of discretion in declining to order a jury trial.

The Convictions Need Not Be Set Aside to Insure the Appearance of Justice.

The defendants' final point is that the entire record of this case indicates that the judgment below must be reversed to preserve the appearance of justice. We cannot agree.

Upon remand, the appearance of justice was fully satisfied. First of all, the Chief Justice appointed a fair-minded judge from another jurisdiction who had nothing to do with the original contempt adjudications or the conspiracy trial. When we reversed the original contempt convictions, we deemed eighteen of the original contempt specifications and part of another to be legally insufficient. 461 F.2d at 400-401. This left 141 of the specifications for possible trial. However, the Government dismissed 89 of those unilaterally, leaving only 52 of the remanded contempt charges for trial. 370 F.Supp. at 1307. At the conclusion of the Government's case, the court dismissed two of the specifications and acquitted the defendants of 24, so that on-

ly 26 specifications remained. Idem. At the completion of the trial, defendants were found not guilty of thirteen specifications. 370 F.Supp. at 1323. Thereafter the present defendants were found guilty of the charges in only thirteen specifications. 370 F.Supp. at 1323-1324. This drastic winnowing process surely demonstrates the dispassionate nature of the trial.

Having reviewed the record herein, we conclude that defendants received sufficient procedural fairness to satisfy the appearance of justice. To insure continuing respect for the judicial system, it was necessary to try the defendants for the overwhelming misconduct they demonstrated at the conspiracy trial. In not imposing fines or sentences, the district judge gave weight to the various factors that the defendants have urged in

favor of dismissal.

The contempt convictions are affirmed.

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FAIRCHILD, Circuit Judge, concurring. I concur in the opinion, including affirmance of the finding on Kunstler specification VI. I do find it necessary, however, to recognize the difficulty in determining objectively that the conduct involved in this specification amounted to an actual obstruction of justice. It seems to me that in applying and preserving the federal rule that disrespect is not punishible contempt unless the conduct amounts to an actual obstruction of justice (cases cited, United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972)) we are willing to presume or infer the existence of obstruction where the conduct appears to us extremely inappropriate, indeed outrageous, and shocking.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

| | | |
|---|---|---|
| In the Matter of | : | |
| | : | |
| DAVID T. DELLINGER, ET AL. | : | 72 CR 925 |
| | : | |

MEMORANDUM AND ORDER OF THE COURT

Presently before the Court is defendants' motion to dismiss or, in the alternative, for a judgment of acquittal, filed at the conclusion of the government's case. The motion has been fully briefed and argued. The motion is in four parts. The Court will deal separately with each of these parts.

I. DEFENDANTS' MOTION TO DISMISS

All defendants have moved to dismiss each and every one of the charges against them on the ground that "to continue further with these proceedings is so fundamentally unfair as to deny them due process of law, and so individually [sic]

discriminatory as to deny them the equal protection of the law, in violation of the Fifth Amendment to the Constitution of the United States." In support of their motion, defendants argue that the misconduct of the trial judge and the prosecutors toward the defendants, as found by the Court of Appeals, United States v. Dellinger, 472 F.2d 340, 388-89, n.84, 87 (7th Cir. 1972), was so egregious that a continuance of the prosecution would further undermine the integrity of the judicial system, and therefore would not be in the public interest. They urge that it is fundamentally unfair that the judge and prosecutors should receive no more than "ritualistic verbal spanking," see United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2nd Cir. 1946) (Frank, J., dissenting), while defendants are subject to a criminal contempt prosecution.

Substantially the same argument was presented to and rejected by the Court of Appeals for the Seventh Circuit when it remanded the present contempt charges for trial; that court determined, as to those specifications found to be legally sufficient, "none of the charges merits dismissal 'in the interests of justice.'" In re Dellinger, 461 F.2d 389, 401 (7th Cir. 1972).[1/] Substantially the same argument was also presented to and rejected by this Court in its memorandum of opinion and order dated April 4, 1973 denying

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1/ In concluding his opinion, Judge Cummings stated:

> After careful consideration of the arguments of appellants and amici curiae, in our judgment, except as to those legally insufficient, none of the charges merits dismissal "in the interests of justice." In the words of Mr. Justice Cardozo, "Justice though due to the accused, is due to the accuser also." Therefore, the contempt conviction of appellants are reversed and remanded for further proceedings not inconsistent herewith. In re Dellinger, supra, 461 F.2d at 401 (footnotes omitted).

defendants' previous motion to dismiss. In re Dellinger, 357 F.Supp. 949, 954 (N. D. Ill. 1973).

This Court realizes that criminal contempt charges are prosecuted on behalf of the court and that their purpose is to vindicate the judicial process. This Court also appreciates that the court itself must ultimately determine whether such a prosecution is truly in the public interest. But defendants have presented no consideration which affords any sufficient ground for the outright dismissal of these contempt charges. The previous decisions of the Court of Appeals and of this Court that the public interest does not require the dismissal of this prosecution must stand.

In oral argument, defendants advanced two further contentions in support of their motion to dismiss, which apparently have not yet been considered either by the

Court of Appeals or this Court. First, they contend that the government is using the present prosecution to harass or punish the defendants for expressing views critical of the government, in derogation of their First Amendment rights of free expression. They rely on United States v. Falk, 479 F.2d 616 (7th Cir. 1973) and United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), two recent cases which clearly stand for the proposition that a prosecution brought for the purpose of punishing or stifling an individual or a group for participation in protected First Amendment activities is unconstitutionally discriminatory.

Second, relying on principles enunciated long ago in Yick Wo v. Hopkins, 118 U.S. 356 (1886), they allege that counsel for the government engaged in conduct similar to that of the attorney de-

fendants Weinglass and Kunstler and, therefore, that the prosecution for contempt of only defense counsel constitutes an unconstitutionally discriminatory prosecution.

The authorities relied upon for these two arguments note that a criminal prosecution is presumed to be undertaken in good faith unless "a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose." United States v. Falk, supra at 620-21. See also Oyler v. Boles, 368 U. S. 448 (1962); Snowden v. Hughes, 321 U. S. 1 (1944); Moss v. Hornig, 314 F.2d 89 (2nd Cir. 1963); United States v. Maplewood Poultry Co., 320 F.Supp. 1395 (D.Me. 1970); cf. Yick Wo v. Hopkins, supra at 373-74. In the present case, defendants have presented no evidence to support their allegation that the prosecution of

the present charges amounts to a discriminatory and unconstitutional prosecution. Defendants have drawn the Court's attention to a number of statements and remarks of the government counsel presented in the transcript which they state demonstrates the alleged misconduct of those counsel. Even assuming arguendo that these statements and remarks constituted contumacious misconduct, this Court can find no satisfactory showing by defendants that the United States, on behalf of the court, has pursued the present prosecution for a discriminatory and unconstitutional purpose. Cf. Oyler v. Boles, supra; Snowden v. Hughes, supra; Moss v. Hornig, supra; United States v. Maplewood Poultry Co., supra.

* * *

The defendants' motion to dismiss is DENIED.

## II. DEFENDANT KUNSTLER'S MOTION TO DISMISS SPECIFICATION NO. 4.

Defendant Kunstler has moved the Court to dismiss Specification No. 4 of the charges against him for failure to charge an offense with sufficient specificity.

Specification No. 4 charges, first, that in the course of the direct examination of Mayor Richard J. Daley of Chicago, which runs from page 13,900 to page 14,094 of the official transcript, comprising almost 200 page, defendant Kunstler "asked no less than 83 questions which were objectionable, mostly leading and suggestive"; and, second, that defendant Kunstler directly violated the court's order by moving to have Mayor Daley declared a "hostile witness" in the presence of the jury.

Plainly, so much of Specification No. 4 as charges defendant Kunstler with know-

ingly asking improper questions, without specifying the questions alleged to be objectionable, lacks the specificity required of a criminal charge in order that the defendant may be sufficiently apprised of the accusation against him and adequately defend against it. See Fed. R. Crim. P. 42. As Judge Kaufman stated in the recent case of United States v. Meyer, 346 F.Supp. 973, 977 (D.D.C. 1972):

> While a judge's contempt certificate need not set forth in full the complained of trial incidents, it must refer to them with sufficient specificity to state their nature and the reason why they constituted contempt. Nor can any such lack be cured by the furnishing of particulars at a subsequent date by the United States Attorney....
>
> * * *

Defendant Kunstler's motion to dismiss so much of Specification No. 4 as charges him with asking improper leading and suggestive questions is GRANTED, and that part of Specification No. 4 is

DISMISSED.

To the extent that the motion may be considered as addressed to that part of Specification No. 4 which charges defendant Kunstler with violating the court's order by moving to have Mayor Daley declared a "hostile witness" in the presence of the jury, the motion is DENIED.

III. DEFENDANT DAVIS' MOTION TO DISMISS SPECIFICATION NO. 4.

Defendant Davis has also moved for dismissal of Specification No. 4 of the charges against him for failure to charge an offense with sufficient specificity.

Specification No. 4 charges that during his cross-examination by the government attorney, which occurred over the course of three trial days and occupies some 433 pages of the official transcript (TR 17,820-18, 245), defendant Davis violated 43 court orders by not restricting his answers to the scope of the questions

posed. As with Specification No. 3 of the charges against defendant Kunstler, this specification must be dismissed for failure to charge an offense with the required specificity (see II, supra).

* * *

Defendant Davis' motion to dismiss Specification No. 4 of the charges against him is GRANTED, and Specification No. 4 is DISMISSED.

IV. DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL.

All defendants have moved, pursuant to Fed. R. Crim. P. 29(a), for a judgment of acquittal as to each and every charge against them. The mandate of Rule 29(a) is that the Court must order the entry of judgment of acquittal of any such charge "if the evidence is insufficient to sustain a conviction" of that charge. The Court is therefore called upon to determine with respect to each of the 52 contempt specifications presently before it

whether the evidence presented by the government, which consists solely of the official transcript of the trial, supplemented by defendants' cross-examination of the five court reporters, is sufficient to support a finding that the defendant named in that specification is guilty of the charge against him beyond a reasonable doubt. United States v. Seale, 461 F.2d 345, 372 (7th Cir. 1972).

In determining the sufficiency of the government's proof of the present specifications, the Court is governed by the legal standards relating to the acts of contempt charged as set forth in the two opinions of the Court of Appeals for the Seventh Circuit remanding the contempt proceedings against the present defendants and those against their former codefendant Seale, In re Dellinger, supra; United States v. Seale, supra, as those standards

have been further developed in two subsequent opinions in which that court tested the sufficiency of criminal contempt convictions. In re Chase, 468 F.2d 128 (7th Cir. 1972); Robson v. Oliver, 470 F.2d 10 (7th Cir. 1972). See also Robson v. Malone, 412 F.2d 848 (7th Cir. 1969).

A. Non-Lawyer Defendants. With respect to the non-lawyer defendants, the Court of Appeals has made clear in Seale that four elements are required to support a criminal contempt conviction under 18 U.S.C. §401(1).[3/ [sic]] See generally Seale, supra at 366-71.

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3/ 18 U.S.C. §401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.

(1) First, the conduct in question must be "in the court's presence or so proximate that it obstructs the administration of justice." Id. at 367.

Here, it is undisputed that the conduct charged took place in the court's presence.

(2) Second, the conduct at issue must constitute "misbehavior."

The Court of Appeals has defined "misbehavior" as "conduct inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator," the role of each having been "molded to insure that a judicial proceeding is orderly, dignified, and confined to a rational search for truth in the context of defined legal issues." Id. at 366-67. "There must be silence except as the orderly conduct of business calls for speech." Id. at 367 (quoting from

Robson v. Malone, supra at 850). "The standards of proper courtroom decorum are not altered and should not be applied differently because a trial may be characterized as political or because improprieties may be said to spring forth as if a 'natural human response.'" Idem. Finally, the Court of Appeals has made clear that "impropriety on the part of the trial judge cannot justify or excuse contemptuous conduct"; judicial error, judicial or prosecutorial misconduct, and judicial or prosecutorial provocation are to be considered only as extenuating and mitigating circumstances. Dellinger at 401; Seale at 361-63.

(3) Third, the alleged contemnor must have acted with the requisite intent.

The Court of Appeals has defined the minimum required intent as "a volitional act done by one who knows or should rea-

sonably be aware that his conduct is wrongful." Seale at 368. Thus, proof of a specific intent to obstruct justice is unnecessary to establish the requisite intent. Id. at 368-69. A defendant cannot be cited for contempt for borderline conduct, unless he has been first warned that such conduct will be regarded as contumacious. Id. at 366.[4/] And finally, the Court of Appeals has stated that conduct depicted in the trial transcript, without more, may itself sufficiently indicate intent to satisfy the government's burden of proof on this issue. Id. at 369.

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4/ Under the intent standard which we will shortly enunciate, a defendant will be protected against the possible unfair surprise of being cited for contempt for conduct that could not be reasonably believed improper when committed. Accordingly, an absence of any warning that borderline conduct is regarded as contumacious could be fatal to a contempt citation therefor. Idem. (citation omitted).

(4) Fourth, the conduct in question must amount to an "actual and material" obstruction of the administration of justice. Idem.

The Court of Appeals has rejected a standard which would make punishable "any interruption" which "diverts the judge's attention from the orderly dispatch of the trial." Idem. It has stated, however, that "the seriousness of the misbehavior bears on what conduct may be found materially obstructive." Idem. Recognizing that "obstruction is an elusive concept which does not lend itself to general statements," idem., the Court of Appeals has nevertheless delineated certain types of conduct which do and do not rise to the level of obstruction:

(i) "Mere disrespect or affront to the judge's sense of dignity" is not alone sufficient; however, "at some point

disrespect and insult become actual and material obstruction." Id. at 369-70. "A showing of imminent prejudice to a fair and dispassionate proceeding is, therefore, necessary to support a contempt based upon mere disrespect or insult." Id. at 370. In determining whether the disrespectful remarks so imperil the proceeding, the reasonably to be expected reactions of those in the courtroom to the words or acts under scrutiny are relevant" and "the test of contumaciousness of words spoken during a court proceeding is their effect as contemporaneously understood by those who heard the words spoken in the courtroom. This includes the judge as well as other persons present." Idem. (quoting from Parmelee Transp. Co. v. Keeshin, 292 F.2d 806, 810 (7th Cir. 1961).

(ii) The manner in which insulting

remarks are spoken may raise otherwise non-obstructive remarks to the level of an obstruction. Idem. 5/ Furthermore, the delays caused by such remarks or other misbehavior may be sufficient to constitute a material obstruction, and thus "if a not insubstantial delay is entirely unnecessary and the misconduct serves, for instance, solely to vent the speaker's spleen, the requisite obstruction would be present." Idem. Differences in language patterns between different social, ethnic, political groups are, of course, relevant to the issue of intent. Idem.

(iii) "Failure to heed the directive of the Court to desist from arguing, to sit down, or to remain quiet may indeed

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5/ In the present case, since the government did not present testimony or evidence beyond the official transcript, the Court cannot determine whether insulting remarks disclosed by the record were shouted or accompanied by physical demonstration.

constitute an actual material obstruction to the administration of justice." Id. at 371. "A certain amount of leeway must be allowed. But where the directive is clear, the judge's insistence on obedience is not undercut by his further rejoinder, and the party directed understands what is being asked of him, he must obey." Idem.

(iv) "Where there is legally adequate representation and no pressing need for the litigant to interject himself into the proceedings," any such interjection may rise to the level of an obstruction. Dellinger, supra at 401.

(v) Finally, with respect to the refusals of defendants to stand when court is convened and recessed, the Court of Appeals has held that "such symbolic acts, when not coupled with further disturbance or disruption, sometimes might not rise to the level of an actual and material

obstruction of the judicial process"; when, however, a refusal to stand "is accompanied by some disturbance, disorder or interruption, an obstruction may exist." Idem. As the court has since stated in Chase, supra at 133:

> A participant's or spectator's defiance in the face of the court's insistence on his rising can supply the requisite obstruction because the judge properly "may require such rising." But even without any reaction by the judge, the failure to rise may amount to an actual and material obstruction if, for instance, as is quite likely, it distracts others in the courtroom or provokes a reaction on their part or is accompanied by a failure to become silent or focus attention on the business before the court.

Applying the foregoing standards to the contempt specifications against the non-lawyer defendants, the Court holds that, for reasons to be briefly stated, the evidence presented by the government is insufficient as a matter of law to sup-

port the following charges:

Dellinger II; Davis I, III; Hayden I; Hoffman I, III; Rubin I, III; Weiner I; Froines I (Refusals to Rise at the Beginning of a Court Session).

The record does not show that the court insisted on the defendants rising; or that such failures to rise distracted others in the courtroom, caused a delay, or provoked a reaction on the part of others in the courtroom. No material obstruction resulted.

Dellinger I.

The record does not show that the court gave any prior warning that the conduct charged would be regarded as contumacious. The record does not show that the conduct charged occasioned such a substantial delay of the proceedings as to constitute a material obstruction.

Dellinger XI.

The record does not show that the conduct charged caused any delay or other disruption of the proceedings. No material obstruction resulted.

Hayden II.

The record does not permit a finding beyond a reasonable doubt that the defendant knew or should reasonably have been aware that his conduct was wrongful.

Rubin II.

The record does not permit a finding beyond a reasonable doubt that this defendant made the only comment charged to him in the specification which could be regarded as contumacious.

Weiner II.

The record does not permit a finding beyond a reasonable doubt that the defendant made the remark charged to him in the specification in a loud enough voice to be heard by the court or jury.

The record does not show that the remark occasioned a material obstruction or that the defendant acted with the requisite intent.

Weiner III.

The record does not permit a finding beyond a reasonable doubt that the defendant engaged in the conduct charged. The record does not show that the conduct charged to the defendant occasioned any delay or other disruption of the proceedings so as to constitute a material obstruction.

Froines II.

The record does not show that the conduct charged to the defendant occasioned any delay or other disruption of the proceedings so as to constitute a material obstruction.

Froines III.

The record does not show that the

conduct charged to the defendant occassioned any delay or other disruption of the proceedings so as to constitute a material obstruction.

Applying the standards delineated above to the remaining contempt specifications against the non-lawyer defendants, the Court cannot say that the evidence presented by the government is insufficient as a matter of law to support the following charges:

Dellinger III, IV, V, VI, VII, VIII, IX and X;

Davis II and V;

Hayden III;

Hoffman II, IV, V, VI and VII;

Rubin IV, V and VI.

* * *

Defendants' motion for judgment of acquittal is GRANTED, and judgment will be entered acquitting the defendants of the charges against them in the following

specifications: Dellinger I, II and XI; Davis I and III; Hayden I and II; Hoffman I and III; Rubin I, II and III; Weiner I, II and III; Froines I, II and III. With respect to all other specifications, defendants' motion for judgment of acquittal is DENIED.

B. Lawyer Defendants. With respect to each of the contempt specifications against the lawyer defendants, the issue before the Court is whether the evidence presented by the government--consisting, it bears repeating, solely of the official transcript--establishes beyond a reasonable doubt that the conduct charged rose to the level of intentional misbehavior in the presence of the court which amounted to an actual and material obstruction of the administration of justice, as the Court of Appeals has defined the essential elements of the crime of

contempt in Seale. Dellinger, supra at 397; Oliver, supra at 12. In addition

> where, as here, the conduct complained of is that of an attorney engaged in the representation of a litigant, the search for these essential elements of the crime of contempt must be made with full appreciation of the contentious role of trial counsel, and his duty of zealous representation of his client's interests. Idem.

As to attorney contempts, in both Dellinger and Oliver, the court also quoted with approval the language of the Supreme Court in In re McConnell, 370 U.S. 230, 236 (1961):

> [W]hile we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom...it is also essential to the fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice. Dellin-

ger at 397; Oliver at 13.

With respect to the requisite intent, the Court of Appeals has further stated that attorneys may be "...persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf," Dellinger at 400, and that "...an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially in the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth." Idem.

Thus, in determining whether an attorney is guilty of criminal contempt, the only issue is, as stated by the Court of Appeals in Oliver, "...whether it can 'clearly be shown' from the record that... [the attorney's] conduct rose to the level

of contemptuous 'misbehavior' which 'obstructed' the judge in performance of judicial duty." Oliver at 12. See also McConnell at 234. In sum, attorneys must be given "great latitude" in the area of vigorous advocacy, and doubts in delineating the line between vigorous advocacy and obstruction are to be resolved in favor of advocacy. Dellinger at 398; Oliver at 13. As the Supreme Court stated in McConnell,

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. 370 U.S. at 236.

In Dellinger and Oliver, the Court of Appeals has set forth certain types of conduct by attorneys which do and do not rise to the level of contemptuous misbehavior constituting an actual and material

obstruction. See generally Dellinger at 397-401; Oliver at 13-14:

(1) Attorneys may not persist in continuing argument after express orders by the trial judge to cease. Dellinger at 398. Good faith is not an absolute defense to a contempt citation for persistent argument, even thpugh the attorney has not been given a reasonable opportunity to be heard. Idem. On the other hand, "...without an actual obstruction, there can be no contempt." Idem. And "...where the judge is arbitrary or affords counsel inadequate opportunity to argue his position, counsel must be given substantial leeway in pressing his contention...." Id. at 399.

(2) When, despite a court directive to cease argument, the trial judge adds a rejoinder or a statement which calls for a response by the attorney," an in-

vited, additional response cannot subsequently be viewed as a contemptuous violation of the order." Idem.

(3) An attorney is not required to refrain from reply when the judge has charged him with professional misconduct; he "...may insist upon being heard in his own defense so long as his response is respectful." But, while the attorney may respond to such an attack, "[e]ven if the judge's accusation be unfounded, or ill-tempered, it does not protect counter-misbehavior...." Idem.

(4) At attorney has no affirmative obligation to restrain his client from disruptive conduct; he commits contempt, however, if he encourages disruptive behavior by a client or "...fans the flames of existing frictions...." Id. at 399-400. Unless the attorney's conduct is the occasion for disruptive conduct by others

in the courtroom, the attorney cannot be held responsible for that conduct. Oliver at 13.

(5) "[M]ere disrespect or insult cannot be punished where it does not involve an actual and material obstruction." Dellinger at 400. "This is particularly true with respect to attorneys when the 'heat of courtroom debate' may prompt statements which are ill-considered and might later be regretted." Idem. When, however, the attorney's remarks create an "imminent prejudice to a fair and dispassionate proceeding," the line "beyond which disrespect becomes obstruction" is crossed. Idem. A material obstruction may result if unnecessary and significant delay is caused by insulting remarks which serve, for instance, only "...to vent the speaker's spleen...." Idem. The manner in which the remark was made may also be

significant.[6] Idem.

(6) Finally, it must be reiterated that, as the Court of Appeals made clear in both Seale and Dellinger, impropriety on the part of the trial judge cannot justify or excuse contemptuous conduct. However, judicial (or prosecutorial) provocation is to be considered...in extenuation of the offense and mitigation of any penalty to be imposed." Dellinger at 401; Seale at 361-64.

Bearing in mind the "'extreme liberality' afforded trial counsel in their representation of clients, and resolving any doubts in favor of vigorous advocacy," Oliver at 13, the Court holds, for the reasons to be stated, that the evidence presented by the government is insufficient as a matter of law to support the following charges against the defendants

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6/ But see Note 5, supra.

Weinglass and Kunstler:

Weinglass I, II, IV and V.

The record does not "clearly show" that the conduct charged to defendant Weinglass in these specifications was conduct "so inappropriate to...[his] role as trial counsel as to exceed the 'outermost bounds' of vigorous advocacy." Oliver at 13, or that such conduct "rose to the level of contemptuous 'misbehavior' which 'obstructed' the judge in the performance of judicial duty." Oliver at 12. See also McConnell at 234. Furthermore,

(i) with respect to I, the record does not show that, as charged in the specification, defendant Weinglass accused the judge of dishonesty or otherwise insulted the court, and the remarks of this defendant set forth in the second part of the specification appear to have been in response to the court's previous statement

that defendant Weinglass needed a defense (TR 16,665);

(ii) with respect to II and V, the record does not permit a finding beyond a reasonable doubt that defendant Weinglass, in attempting to protect his clients' rights, knew or should reasonably have been aware that his persistence exceeded the "outermost limits" of his proper role as counsel;

(iii) with respect to the last portion of the remarks charged to defendant Weinglass in II, they were in reply to statements by the trial judge which reasonably called for a response.

Kunstler II.

The record does not "clearly show" that the conduct charged to defendant Kunstler in this specification caused any substantial delay or other disruption of the proceedings. No material obstruction

resulted.

Kunstler III.

The record does not "clearly show" that the conduct charged to defendant Kunstler in this specification caused any substantial delay or other disruption in the proceedings so as to constitute a material obstruction.[7/]

Kunstler IX.

The record does not "clearly show" that the remarks charged to defendant Kunstler in this specification exceeded the "outermost limits" of vigorous advocacy or rose to the level of a material obstruction. Further, many of the remarks charged to this defendant were in reply to statements by the trial judge which reasonably called for a response.

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7/ The Court notes that the trial judge apparently felt that a cautionary instruction was sufficient to remedy any impact of the defendant's remarks on the jury (TR 12, 395).

Applying the same principles to the remaining contempt specifications against the defendants Weinglass and Kunstler, the Court cannot say that the evidence presented by the government is insufficient as a matter of law to support the following charges:

Weinglass III;

Kunstler I, that part of IV not previously dismissed, V, VI, VII and VIII.

* * *

Defendants' motion for judgment of acquittal of the charges against defendants Weinglass and Kunstler is GRANTED, and judgment will be entered acquitting these defendants of the charges against them in the following specifications: Weinglass I, II, IV and V; Kunstler II, III and IX. With respect to all other specifications against defendants Weinglass and Kunstler, defendants' motion

for judgment of acquittal is DENIED.

IV.

IT IS SO ORDERED.

Dated at Chicago, Illinois, this 6th day of November, 1973.

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United States District Judge
Sitting by Designation

WILLIAM M. KUNSTLER-SPECIFICATION VI

On February 2, after the Court ruled that Mr. Kunstler would have to abide by his representation the previous Friday, and therefore would not be able to call the Reverend Ralph Abernathy to the stand, Mr. Kunstler made the following speech at the conclusion of his argument:

"The Court: ... There have been several witnesses called here during this trial-I need not mention their names-whose testimony the Court ruled could not even be presented to the jury: singers, performers, and former office holders. I think in the light of the representations made by you unequivocally, sir, with no reference to Dr. Abernathy, I will deny your motion that we hold-

Mr. Kunstler: I want to comment on this, your Honor, because I think what you have just said is about the most outrageous statement I have ever heard from a bench, and I am going to say my piece right now, and you can hold me in contempt right now if you wish to.

You have violated every principle of fair play when you excluded Ramsey Clark from the witness stand. The New York Times, among others,

has called it the ultimate outrage in American justice.
Voices: Right on.
Mr. Kunstler: I am outraged to be in this court before you. Now because I made a statement on Friday that I had only a cameraman, and I discovered on Saturday that Ralph Abernathy, who is the chairman of the Mobilization, is in town, and can be here, and because you took a whole day from us on Thursday by listening to this ridiculous argument about whether Ramsey Clark could take that stand in front of the jury, I am trembling because I am so outraged. I haven't been able to get this out before, and I am saying it now, and then I want you to put me in jail if you want to. You can do anything you want with me, if you want to; because I feel disgraced to be here, to say to us on the technicality of my representation that we can't put Ralph Abernathy on the stand. He is the co-chairman of the MOBE. He has relevant testimony. I know that doesn't mean much in this Court when the Attorney General of the United States walked out of here with his lips so tight he could hardly breathe, and if you could see the expression on his face, you would know, and his wife informed me he never felt such anger at the United States Government as at not being able to testify on that stand.
Voices: Right on.
Mr. Kunstler: You can't tell me that Ralph Abernathy cannot take the stand today because of the technicality of

whether I made a representation. That representation was made in perfect good faith with your Honor. I did not know that Reverend Abernathy was back in the country. We have been trying to get him for a week and a half to be the last witness for the defense in this case. And now to tell me that we are going ahead, the Government is ready, after you took Thursday from us to have this argument over whether a man could be presented to a jury, I told your Honor then, and I am telling you now, no American court has ever done what your Honor did-

Voices: Right on.

Mr. Kunstler: -basing it on a case which was inapplicable to the situation. That was done for one purpose only, and the New York Times said it more beautifully than I could say it, and they said, 'It was done to make inadmissible anything that would "interfere" with the Justice Department's intent to prove a conspiracy to incite a riot during the Democratic National Convention.'

Voices: Right on.

Mr. Kunstler: That was the reason behind your Honor's ruling, nothing short of that.

I have sat here for four and a half months and watched the objections denied and sustained by your Honor, and I know that that is not a fair trial.

I know it in my heart. If I have to lose my license to practice law and if I have to go to jail, I can't think of a better cause to go to jail for and to

lose my license for -
A Voice: Right on.
Mr. Kunstler: - than to tell your Honor that you are doing a disservice to the law in saying that we can't have Ralph Abernathy on the stand. You are saying truth will not out because of the technicality of a lawyer's representation. If that is what their liberty depends upon, your Honor saying I represented to you that I had a cameraman, and that was our only witness, a cameraman, whom we can't get, incidentally, then I think there is nothing really more for me to say.
The Court: There is not much more you could say, Mr. Kunstler.
Mr. Kunstler: I am going to turn back to my seat with the realization that everything I have learned throughout my life has come to naught, that there is no meaning in this court, and there is no law in this court-
Voices: Right on.
Mr. Kunstler: -and these men are going to jail by virtue of a legal lynching-
Voices: Right on.
Mr. Kunstler: -and that your Honor is wholly responsible for that, and if this is what your career is going to end on, if this is what your pride is going to be built on, I can only say to your Honor, 'Good luck to you.'
(There were shouts of 'Right On', and there was applause in the courtroom.)" Official Transcript, Pages 19,108-112.

WILLIAM M. KUNSTLER - SPECIFICATION VII AND OMITTED TRANSCRIPT PAGES.

PART I

After the Court ruled, on February 2, that the Reverend Abernathy would not be permitted to take the stand, the Court ordered that Mr. Kunstler and the other attorneys and defendants not mention the name of the Reverend Abernathy in front of the jury. Mr. Kunstler not only defiantly indicated that he fully intended to violate that order, but in the middle of the direct testimony of the witness Lynskey, Mr. Kunstler actually brought the Reverend Abernathy into the courtroom and made a statement to the jury and physically embraced the Reverend Abernathy in front of the jury. This flagrant violation of the Court's order is reported as follows:

> "Mr. Schultz: Your Honor, may the defendants and their counsel then not make any reference in front of

the jury that they wanted Doctor Abernathy to testify?
Mr. Kunstler: No, no.
The Court: I order you not to make such a statement.
Mr. Kunstler: We are not going to abide by any such comment as that.

Doctor Ralph Abernathy is going to come into this courtroom, and I am going to repeat my motion before that jury.
The Court: I order you not to.
Mr. Kunstler: Then you will have to send me to jail, I am sorry.
Mr. Schultz: Your Honor, it is our position we are ready to go ahead now. If Doctor Abernathy were here, if he were here, it would be our position that they could put him on, but he is not here. We are ready to go ahead. We would like to proceed with the case.
The Court: Bring in the jury, Mr. Marshal.
Mr. Kunstler: We have a right to state our objection to resting before the jury.
The Court: Don't do it.
Mr. Kunstler: I am going to have to put my liberty in your hands on that score.
Mr. Schultz: Mr. Kunstler is simply inviting it.
Mr. Kunstler: Oh, of course, I am inviting it because what your Honor is doing is a disgrace in this court.
The Court: He did more than invite.
Mr. Kunstler: He will be here in five minutes. Your Honor, what is an honest man to do when your Honor has done

what he has done? What am I to do? Am I to stand here and say, 'Yes, yes, yes'?
The Court: I will ask you to sit down. I have heard enough from you along this line this morning, sir. I have never as a lawyer or a judge heard such remarks in a courtroom made by a lawyer.
Mr. Kunstler: Your Honor, no one has heard of such conduct as is going on in this courtroom from the bench. The New York Times is not alone in that respect, and this is the ultimate outrage-and I didn't say-the editorial writers of the New York Times said that.
Mr. Schultz: May we proceed, your Honor?
The Court: Yes, I have ordered the jury brought in." Official Transcript, Pages 19,140-42.

* * *

The following portion of the trial transcript before Judge Hoffman was omitted in Mr. Kunstler's Specification VII as reported by Judge Hoffman and by Judge Gignoux:

"(The following proceedings were had in open court, in the presence and hearing of the jury:)

THE COURT: Good morning, ladies and gentlemen of the jury.

THE JURORS: Good morning, your Honor.

THE COURT: I must inform you that I have called on the defendants to produce whatever witness they had, and they had none ready to proceed, and they did not indicate that they would rest. Hence, I entered an order indicating that the defendants were not ready to proceed as they indicated on Friday they would be, and I let the record show in your presence that the defendants have rested. The work 'rested' in law means they have no further evidence to present.

MR. KUNSTLER: We object to that, your Honor. Dr. Ralph Abernathy is on his way from the airport to this courtroom. We informed your Honor and requested a few moments. He has just arrived back in the country. We want the jury to understand we do not rest. We are prepared to go ahead. We ask merely a few minutes' recess to bring Dr. Abernathy to the stand.

MR. SCHULTZ: The Government's position is if he were here, we wouldn't object to their putting him on, even though they said they had no more witnesses. We want to proceed with the trial. They don't know when he is going to be here. They have said he was going to be here for the last hour.

THE COURT: I have ruled.

MR. SCHULTZ: Yes, sir.

THE COURT: I have ruled.

MR. DAVIS: He called from the airport.

MR. KUNSTLER: The record should indicate that Dr. Abernathy called from the airport.

THE COURT: The record doesn't indicate any such thing.

MR. KUNSTLER: Now, it does, your Honor.

MR. FORAN: Your Honor, may we proceed with the rebuttal case of the Government?

THE COURT: Yes, you may.

(And thereupon the Government, further to maintain the issues on its behalf, introduced the following evidence in rebuttal, to wit:)

ROBERT J. LYNSKEY,
a witness called by the Government in rebuttal, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FORAN:

Q. Will you state your name, please?

A. Robert J. Lynskey, L-y-n-s-k-e-y.

Q. What is your occupation?

A. I am a police officer for the City of Chicago.

Q. What is your rank, sir?

A. Deputy Chief of Patrol.

Q. How long have you been with the

Police Department?

A. Almost twenty-four years.

Q. What are your duties as Deputy Chief of Patrol?

A. I am in-charge of three district stations within the Sixth Police Area -- the East Chicago, the Town Hall and the Foster Avenue Districts.

Q. During the week of and the week prior to the Democratic National Convention in the latter part of August, 1968, what were your duties?

A. I was Deputy Chief of Patrol within the Sixth Area, and in addition, I was in charge of a detail of police personnel assigned to the Lincoln Park area.

Q. Do you know a person by the name of Abbie Hoffman?

A. Yes, I do.

Q. Do you see him here in the courtroom?

A. He is at the witness table. He has a yellow sport shirt on. He has his finger in the air at the moment. There are thin lines in the sport shirt.

MR. FORAN: May the record show that the witness identified the defendant Hoffman?

THE COURT: The record may so indicate.

BY MR. FORAN:

Q. Directing your attention to Saturday, August the 24th, did you have a conversation with the defendant Hoffman in the Cultural Arts Center in Lincoln Park in which you told him, 'Kick me in the shins --'

MR. KUNSTLER: Your Honor, you talk about leading questions, I have never heard one that started out that way.

MR. FORAN: This is a specific rebuttal question calling attention to a specific sentence that the witness Hoffman testified Deputy Chief Lynskey said to him. I must call his attention to that specific statement because it is a rebuttal question.

MR. KUNSTLER: That is not proper on rebuttal or even under direct, your Honor. He is to ask him what conversation he heard. He is telling the witness exactly what the conversation is.

THE COURT: I do not share your view that it is not proper on rebuttal. I don't know how it can ever be determined whether or not the statement was made unless you put it up to this witness.

MR. KUNSTLER: Ask him what the conversation was.

THE COURT: I overrule your objection.

MR. FORAN: Would you read the question to the witness, please? May the question be read to the witness, please?

THE COURT: Yes, please read the question to the witness.

A VOICE: Now, he's changing the rules.

(Question read.)

MR. FORAN: May I restate the question, your Honor? I was cut off before I finished.

THE COURT: You may. Yes, you may.

BY MR. FORAN:

Q. Directing your attention to Saturday, August 24th, 1968, did you have a conversation with the defendant Hoffman in the Cultural Arts Center in which you said to him, 'Kick me in the shins, and I'll arrest you'?

A. No, I did not.

Q. Have you ever had such a conversation with him?

A. No, I did not.

Q. Have you ever had a conversation with the defendant Hoffman in the Cultural Arts Center in Lincoln Park?

A. No, I have not.

Q. Directing your attention to approximately midnight on Sunday, August 25th, 1968, where were you, sir?

A. I was on Cannon Drive in Lincoln Park, the east end of the park.

Q. And what was occurring?

A. We were preparing lines of police officers to walk through the park and clear the people out of the park.

Q. Were any announcements being made by the police?

A. Yes, for some time previous--

MR. KUNSTLER: Your Honor, I think that is a leading question. He asked him what the police did do. He is telling him the answer. 'Were there any announcements by the police?'

THE COURT: You may revise your question.

MR. FORAN: I will rephrase it, your Honor.

BY MR. FORAN:

Q. What, if anything, were the police doing at that time at midnight?

A. The police were lining up in two ranks while one police vehicle was being utilized to make an announcemnt that the park was closed, and that those people still in the park were in violation of the law.

Q. How many times was that announcement given?

A. That announcement had been given probably a dozen or more times. I heard it three or four times myself.

MR. KUNSTLER: Your Honor, I object to the answer. 'Probably' shows no knowledge on the part of this witness, who heard it three or four times. 'Probably a dozen or more times,' is what I am objecting to.

THE COURT: Read the question and the answer to me, please.

(Question and answer read.)

BY MR. FORAN:

Q. Just what did you hear?

THE COURT: I would say that the witness' answer should be limited to the number of times he heard it.

BY MR. FORAN:

Q. How many times did you hear the announcement?

A. To the best of my knowledge, I heard it three or four times.

Q. Now, did there come a time that the police line moved out from Cannon Drive?

A. Yes, approximately 20 minutes after 12:00, we moved out in a southwesterly direction through the park.

Q. And where were you with respect to the police line at that time?

A. I was in front of the police line, walking backwards most of the time, observing the police line, and trying

to keep it in an orderly fashion.

Q. Were any other officers in similar positions to you?

A. Commander Braasch was also out in the front of the two police lines.

Q. And did you have anything with you to amplify your voice?

A. I was carrying a small amplifier or bull horn as we refer to it, to amplify in two directions.

Q. Could you describe the movement of the police to the southwest?

A. The police lines moved out from the west curb of Cannon Drive, moving slowly and stopping at what would be natural barriers, such as sidewalks, gravel paths, bicycle paths, and so forth, to realign so that we could keep a fairly straight line of police going through the park. We stopped about three times within the park proper, and then finally we stopped on the east curb of Stockton Drive.

Q. And what, if anything, occurred when the police line reached Stockton Drive?

A. There were quite a few people who had just left the park in the parking area of Stockton Drive, some of whom were up on top of vehicles and there was much throwing of missiles at the police officers.

Q. What happened then, sir?

A. We then moved forward through the parking area to the east curb of Clark Street where we again halted the police line.

Q. On that Sunday night, was any tear gas used in the park?

A. No, sir.

Q. How long did it take the police line to move from its starting point at 12:20 on Cannon Drive to the curb of Clark Street?

A. Probably 15 minutes. I think we arrived there at 12:35, 12:40.

Q. Now, directing your attention to approximately midnight on Monday, August 26, 1968, where were you?

A. I was again in Cannon Drive at the east end of Lincoln Park.

Q. And would you describe what was going on at that time?

A. Those people who were still in the park had erected a barricade with picnic tables, and benches, and trash baskets, and any other large objects that would be located within the park, and were behind the barricade. Periodically, some of them would dart out and hurl rocks, bottles, tiles, at the police officers who were forming a line." Official Transcript, Pages 19142-19154. (End of omitted trial transcript.)

* * *

PART II

MR. KUNSTLER: Your Honor, if I can interrupt, Dr. Ralph Abernathy has just arrived.
THE COURT: Let him sit down.
MR. KUNSTLER: I would like to put him on the stand for the defense.
THE COURT: Let him sit down.
MR. KUNSTLER: I would like to move to reconsider to put him on the stand as a witness for the defense. It is now just 11:37.
THE COURT: Let him sit down, please. You may continue with your examination, Mr. Foran.
MR. KUNSTLER: Does your Honor deny my motion?
THE COURT: I do, sir. You may continue with your examination.
MR. KUNSTLER: Your Honor, it is only 16 minutes after the Government said they would have no objection to have Dr. Abernathy testify. He was flown here from Atlanta to be a witness for the defense.
THE COURT: I do not interpret what the Government says to mean that, and the Government is not running this courtroom.
MR. KUNSTLER: Your Honor-
THE COURT: Will you continue?
MR. KUNSTLER: Is the truth to be deprived from this jury because of 16 minutes?
MR. FORAN: Your Honor, the Government is in the middle of the examination of a witness.
MR. KUNSTLER: We have tried to get the few minutes delay so we could bring Dr. Abernathy here.
THE COURT: I ask you to sit down, sir.
BY MR. FORAN:

Q. What was the noise level at that time?
MR. KUNSTLER: Your Honor, before this goes on, would your Honor permit an application for Dr. Abernathy to testify after this witness has testified?
THE COURT: I ask you to sit down.
MR. KUNSTLER: Otherwise we are going to excuse him.
THE COURT: Mr. Marshal, have that lawyer sit down.
MR. KUNSTLER: Can you give me an answer to my question? We want to excuse Dr. Abernathy.
THE COURT: If you will please sit down-
MR. KUNSTLER: I am going to be forced in a minute so I have no alternative.
THE COURT: Yes.
MR. KUNSTLER: Can I get an answer sitting down to my question?
MR. FORAN: Your Honor, the interruption in the midst of the questioning of a witness in the presence of the jury is unheard of, your Honor, I wish he would-
MR. FROINES: So is not putting on a witness.
A VOICE: -going to walk out of the courtroom because we can't put a man on the stand-
A VOICE: Can't put on our witness-
THE COURT: Did you hear what I asked you to do, sir?
MR. KUNSTLER: I am down.
THE COURT: Please continue with your examination.
MR. KUNSTLER: I am going to ask Dr. Abernathy to leave, your Honor. It is obvious that he is not going to testify.
MR. FORAN: Your Honor, the proper

procedure is to discuss such matters outside the presence of the jury, not in the midst of the questioning of the witness.
THE COURT: I ordered him not to discuss that witness in the presence of the jury before the jury came in. He violated my order.
MR. FORAN: Your Honor, may I wait? May I await Mr. Kunstler returning to counsel table?
MR. KUNSTLER: I will be back, your Honor.
THE COURT: Yes, you may wait. Let the record show the hug of counsel for the defendant.
MR. FORAN: Your Honor, the discussion of whether or not the witness should be called as a witness would properly await the finishing of the examination of this witness and the demonstration--
THE COURT: Go ahead.
MR. KUNSTLER: Then I told him to leave, your Honor. He-
THE COURT: All right. You have told him to leave.
MR. KUNSTLER: I can hold him if there is nothing--we want him to testify.
THE COURT: You told him to leave, and I again direct you to sit down. We have had enough this morning.
MR. KUNSTLER: May I send one of the defendants out just to ask him to stay, so perhaps-
THE COURT: No, you may not send one of the defendants out. You may not send-
MR. KUNSTLER: May I go and tell him?
THE COURT: I ask you to sit down.
MR. KUNSTLER: Your Honor, just to tell him so that, if the Government is going to permit him to testify-
THE COURT: I have had enough of your insults this morning.

MR. KUNSTLER: Your Honor, this--I am not being insulting.
THE COURT: You were this morning.
MR. KUNSTLER: I was not insulting. I told you the truth this morning. I told you what the New York Times said-
THE COURT: All right.
MR. KUNSTLER: -about the refusal to put a witness on the stand.
THE COURT: You sit down, sir, or we will arrange to have you put down." Official Transcript, Pages 19154-159.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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In the Matter of :

DAVID T. DELLINGER :
RENNARD C. DAVIS,
JOHN R. FROINES, :
THOMAS C. HAYDEN, Cr. 72-925
ABBOTT H. HOFFMAN, :
JERRY C. RUBIN,
LEE WEINER, :
LEONARD I. WEINGLASS,
and WILLIAM M. KUNSTLER. :

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MOTION FOR DISCLOSURE OF ELECTRONIC OR OTHER SURVEILLANCE, FOR A FULL INVESTIGATION OF SURVEILLANCE, AND FOR FURTHER RELIEF.

Defendants, by their undersigned attorneys, respectfully move this Court pursuant to Federal Rules of Criminal Procedure 16 and 41, the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, and Title 18, U.S.C., Sections 2510-20 and 3504, for an order compelling the United States to disclose to defendants:

1. Any and all actual voice records, tapes, mechanical or electrical recordings, logs, records, memoranda, letters and airtels of any electronic or other surveillance,

a) of any wire or oral communications to which any defendant*/ was a party;

b) of any wire or oral communications at any place in which any defendant had an "interest" at the time of the surveillance; "interest" meaning any property right or any other nexus of use and reasonable expectation of privacy;**/

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*/ As used in this motion, the term "defendant" includes David T. Dellinger, Rennard C. Davis, Abbott H. Hoffman, John R. Froines, Thomas E. Hayden, Jerry C. Rubin, Lee Weiner, Leonard I. Weinglass, and William M. Kunstler.

**/ In order to aid the government in searching for the materials sought by this motion, defendants have annexed as Exhibit A a list of telephone numbers and addresses wherein they have had an expectation of privacy in communications. Since many of the defendants were active in political organizations there is also included a list of such organizations where one or more of the defendants worked and had an expectation of privacy. The list

(fn. cont. next page)

c) of any wire or oral communications at any place put under surveillance for the purpose, in whole or in part, of gathering evidence or leads against any defendant, i.e., directed against any defendant;

d) of any wire or oral communications at any place where any defendant was at the time of the surveillance;

e) of any wire or oral communications in which a defendant is named or otherwise referred to.

2. Any and all actual voice records, tapes, mechanical or electrical recordings, logs, records, memoranda, letters and airtels of any electronic or other surveillance,

a) of any wire or oral communications, one of the parties to which was any

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(fn. cont. from preceding page)
above referred to are <u>not</u> to be considered exhaustive of such places.

attorney associated with the defense, a defense consultant, or legal or clerical assistant associated with any such attorney or legal consultant;

b) of any wire or oral communication at any place in which any attorney associated with the defense, a defense consultant, or legal or clerical assistant associated with any such attorney or legal consultant had an "interest" at the time of the surveillance; "interest" meaning any property right or any other nexus of use and reasonable expectation of privacy;

c) of any wire or oral communications at any place put under surveillance for the purpose, in whole or in part, of gathering evidence or leads against any attorney associated with the defense, a defense consultant, or legal or clerical assistant associated with any such attorney

or legal consultant;

d) of any wire or oral communications at any place where any attorney associated with the defense, a defense consultant, or legal or clerical assistant associated with any such attorney or legal consultant was at the time of the surveillance;

e) of any wire or oral communication in which there is named, or reference is made to, any attorney associated with the defense, defense consultant, or legal or clerical assistant associated with any such attorney or defense consultant. */

3. Any and all actual voice records, tapes, mechanical or electrical recordings,

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*/ Attached hereto as Exhibit B is a list of all persons falling within the category of "attorney associated with the defense, defense consultant, or legal or clerical assistant associated with any such attorney or defense consultant." As to each such person there are included names and telephone numbers where the persons aforesaid had an expectation of privacy. Defendants reserve the right to supplement the data set forth in Exhibits A and B.

logs, memoranda, records, letters, and airtels of any electronic or other surveillance of wire or oral communications such as are described in Paragraphs 1 and 2 above, which surveillance revealed the existence of such conversation, even if not the contents.

4. The demands for disclosure in Paragraphs 1, 2, and 3 above embrace electronic or other surveillance undertaken not only by the United States, its agents and employees, but also such surveillance as may have been made by agents and employees of any other governmental agencies, state or local, or private parties or corporations, if solicited by the government to engage in such electronic surveillance or if electronic surveillance was done in cooperation or in conjunction with the federal government or if the federal government has knowledge or is in a position to ac-

quire knowlege of any electronic surveillance by the aforesaid governments, agencies, private parties or corporations.

5. The demands for disclosure under Paragraphs 1, 2 and 3 above embrace any wire or oral communications to which a party to that conversation allegedly consented.

6. For any electronic or other surveillance as described in Paragraphs 1 through 4 above for which there are no voice records, tapes, mechanical or electrical recordings, logs, memoranda, records, letters, or airtels, demand is made that the names and business addresses of the persons who conducted said surveillance or who have knowledge of said surveillance be disclosed.

7. Demand is also made for any and all applications, affidavits, memoranda, and other papers submitted in support of

applications for executive, administrative or judicial approval of such surveillance as described above, and all administrative, judicial and executive orders, opinions and decisions responsive thereto or relating to the surveillance described above.

8. The demands made above seek not only disclosure of surveillance presently known to the government but also that which in the exercise of due diligence may become known thereto.

9. Defendants further move this Court for entry of an order directing the government to conduct a search of the files of every federal agency which conducts electronic surveillance in order to determine whether there has been electronic surveillance as described above, and directing the government to produce the logs of any unidentified voices at such

places as any of the defendants or their attorneys had an expectation of privacy.

10. Defendants further request entry of an order requiring the government to inquire with respect to the electronic surveillance described above of all state and local jurisdictions where defendants or their counsel, defense consultants, or legal or clerical assistants associated with any such attorney or defense consultant may have been overheard, and to direct a search of the files of every agency within those jurisdictions which conducts electronic surveillance.

11. Defendants further request entry of an order requiring that the government's initial response to this motion be sworn by the person or persons in charge of conducting the search for the surveillance described above, setting forth in detail the nature of the investigation conducted and specifying the particular fed-

eral, state and local agencies inquired of.

12. Defendants further respectfully move this Court for an order of continuing disclosure of the items sought above, under Federal Rules of Criminal Procedure 16(g) and any applicable local rule or rules.

13. Defendants further request an evidentiary hearing prior to trial, at which the government shall present for cross-examination the person or persons whose affidavits are presented under Paragraph 11 above, and any other government officials whose testimony may be necessary, to determine:

a) whether the government has fully complied with the demands made above;

b) the legality of any such electronic or other surveillance;

c) the extent to which the govern-

ment obtained any leads from any such surveillance which was employed; and

d) the extent to which any such surveillance interfered with defendants' rights of counsel.

14. The grounds for this motion, more particularly set forth in the memorandum of law and attachments thereto, are that only through effective pre-trial adversary inquiry can defendants be protected in their right to be free of the effects of unlawful electronic or other surveillance.

15. Defendants further move that this Court issue a protective order directing that the nature and contents of the aforesaid requested materials may not be disclosed by the government to any person, natural or artificial, public or private, whatsoever, except to defendants and their counsel.*/

*/ Signature and Exhibits omitted.

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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In the Matter of

DAVID T. DELLINGER,
RENNARD C. DAVIS,
JOHN C. FROINES,
THOMAS C. HAYDEN,
ABBOTT H. HOFFMAN,
JERRY C. RUBIN,
LEE WEINER,
LEONARD I. WEINGLASS, and
WILLIAM M. KUNSTLER

Cr. 72-925

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SCHEDULE OF REPRESENTATION OF DEFENDANTS IN THE CONTEMPT CASE HEREIN BY ATTORNEYS AND LEGAL WORKERS, SHOWING PERSONS REPRESENTED AND PERIOD OF THEIR REPRESENTATION.

A. Attorneys involved in trial and appeal

1. William M. Kunstler. Represented all*/ defendants**/ for the period from date of indictment, March 20, 1969, up to and including the present date. Additionally, he represented David Dellinger, Rennard Davis, Jerry Rubin and Abbott Hoffman on various occasions for the period beginning about September 1967 to the present.

2. Leonard Weinglass represented all*/ defendants for the period starting approximately March 26, 1969 (two weeks before the arraignment on April 9), up to and including the present date.

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*/ The record shows that Messrs. Kunstler and Weinglass each entered appearances for some but not all of the defendants. This was required for purposes of the trial, and such statements of representation reflected only courtroom appearances. For all other purposes, including daily consultations and preparation of the case, both attorneys represented all the defendants.

** / As the term defendants is used herein it refers to all defendants other than Messrs. Kunstler and Weinglass unless otherwise noted.

Additionally, he represented Thomas Hayden from approximately the Spring of 1966 to the present.

3. Stanley Bass and Irving Birnbaum represented all defendants for the period from the arraignment on April 9, 1969 to the conclusion of the trial.

4. Arthur Kinoy and Morton Stavis were, with respect to the entire period of Mr. Kunstler's representation of defendants herein, associated with him at the Center for Constitutional Rights and actively consulted with him on matters relating to the trial. Subsequent to the trial and up to the date herein they have represented all the defendants including Messrs. Kunstler and Weinglass. Additionally they represented David Dellinger, Rennard Davis, Jerry Rubin, and Abbott Hoffman on various occasions from about September 1967 to the present date.

5. Charles Garry represented all defendants from the time of the indictment, March 20, 1969, until approximately the first week in November, when the case of Bobby G. Seale was severed. Benjamin Dreyfus, Francis McTernan, and Allen Brotsky were partners of Mr. Garry during the foregoing period and actively consulted with him with respect to the foregoing representation.

6. Michael Kennedy, Michael E. Tigar, Dennis Roberts, and Gerald B. Lefcourt represented all defendants from the time of the arraignment on April 9, 1969 to the commencement of the trial, September 24, 1969.

7. Beth Livezey and Michael Sayer were associated with William M. Kunstler and Leonard Weinglass in their representation of all defendants in the Dellinger case from approximately two weeks before

the commencement of the trial on September 24, 1969, up to its conclusion, on or about February 15, 1970.

8. Stuart Ball was associated with William M. Kunstler and Leonard Weinglass in their representation of all defendants in the Dellinger case from approximately June 1969 up to May 1971.

9. Anthony G. Amsterdam, David Bogen, Alan Dershowitz, Herbert O. Reid, Sr., Charles Nesson, Michael E. Tigar, and William W. Brackett represented all the defendants including Messrs. Kunsiter and Weinglass from at or about the conclusion of the trial in February 1970 through the conclusion of the appeal before the Seventh Circuit on May 11, 1972.

10. James B. Moran represented all defendants except Messrs. Kunstler and Weinglass from at or about the conclu-

sion of the trial to the present.

11. Thomas P. Sullivan and John C. Tucker represented William M. Kunstler and Leonard I. Weinglass from at or about the conclusion of the trial through the conclusion of the appeal before the Seventh Circuit on May 11, 1972.

12. James Reif represented all the defendants including William Kunstler and Leonard Weinglass from in or about September 1970 until sometime in July 1972.

13. William Rossmoore and Daniel Crystal were associated with Morton Stavis during the period approximately March to May 1971 in respect to the preparation of the appellate brief.

B. Legal Workers.*/

All legal workers were associated

---

*/ The inclusion of the name of Bobby G. Seale as legal worker in District Court papers was an error (omitted with fn. in Circuit Court as here).

with Messrs. Kunstler and Weinglass in the representation of all defendants for the period beginning approximately at the times indicated below and ending with the conclusion of the trial.

| | |
|---|---|
| Stuart Albert | August, 1969 |
| Sharon Avery | May, 1969 |
| Tasha Dellinger | August, 1969 |
| Lynn Fink | August, 1969 |
| Ann Froines | August, 1969 |
| Mike Gold | August, 1969 |
| Susan Gregory (formerly Susan Schultz) | April, 1969 |
| Donna Gripe | April, 1969 |
| Judith Gumbo | August, 1969 |
| Susan Hathaway | May, 1969 |
| Anita Hoffman | April, 1969 |
| Frank Joyce | August, 1969 |
| Ronald Kaufman | August, 1969 |
| Nancy Kurshan | April, 1969 |
| Robert Lamb | June, 1969 |
| Elizabeth Langer | June, 1969 |
| Marie (Micki) Leaner | April, 1969 |
| Linda Miner | August, 1969 |
| Gretchen Morrison | August, 1969 |
| Dick O'Brien | August, 1969 |
| Dorothy Palombo | April, 1969 |
| Abe Peck | June, 1969 |
| Penny Puhl | April, 1969 |
| Pamela Zumwalt | June, 1969 |

MORTON STAVIS
WILLIAM M. KUNSTLER
c/o Center for Constitutional
Rights
588 Ninth Avenue
New York, New York 10036

LEONARD I. WEINGLASS
2909-1/2 Ocean Front Walk
Venice, California 90291

ATTORNEYS FOR DEFENDANTS

FILED with the Court
March 26, 1973.

## CONSTITUTIONAL AMENDMENTS, STATUTES AND RULES INVOLVED.

AMENDMENT IV - SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI - JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of

Counsel for his defence.

18 U.S.C.
§401. Power of court.

A court of the United States shall have power to punish by fine or imprisonement, at its discretion, such contempt of its authority, and none other, as-

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Criminal Procedure
Rule 42 Criminal Contempt

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall

state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt

the court shall enter an order fixing the punishment.

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569-954—75——1

# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-714

DAVID T. DELLINGER, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–30a) is reported at 502 F. 2d 813. Opinions of the district court are reported at 370 F. Supp. 1304 and 357 F. Supp. 949.

### JURISDICTION

The judgment of the court of appeals was entered on September 6, 1974. The court denied a petition for rehearing and suggestion for rehearing *en banc* on October 16, 1974. On November 4, 1974, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including

December 9, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether *Alderman* v. *United States*, 394 U.S. 165, requires the government to make available to defendants in a contempt proceeding all logs of electronic surveillance, even though the government's case is composed solely of the transcripts of the trial at which the contempt occurred.

2. Whether the conduct of petitioner Kunstler was sufficiently obstructive and sufficiently intentional to support a conviction for contempt.

3. Whether prosecution of petitioners for contempt was unjust because acts of misconduct by the prosecutor were not punished by contempt, and because an unjudicial atmosphere was created in part by the trial judge and prosecutors.

## STATEMENT

Petitioners were cited for contempt during the "Chicago Seven" trial, involving alleged violations of the Anti-Riot Act of 1968 during the August 1968 National Convention of the Democratic Party in Chicago, Illinois. The substantive convictions in that case were reversed on appeal (*United States* v. *Dellinger*, 472 F. 2d 340 (C.A. 7)), and the government elected not to retry the defendants. Petitioners Dellinger, Hoffman and Rubin were among the defendants in that case, and petitioner Kunstler was one of two counsel for the defendants.

After the Anti-Riot Act case had been submitted to the jury, United States District Judge Julius Hoffman summarily held all seven defendants and both attorneys in contempt of court. Thirty-two specifications were listed against Dellinger, 23 against Hoffman, 15 against Rubin and 24 against Kunstler. The consecutive sentences imposed aggregated eight months' imprisonment for Hoffman, and other sentences were longer. The longest was a term of four years' and 13 days' imprisonment for Kunstler. The contempt convictions also were reversed on appeal and the case was remanded for retrial before another judge. *In re Dellinger*, 461 F. 2d 389 (C.A. 7).

Prior to the second trial the Chief Justice, pursuant to 28 U.S.C. 292(d), designated United States District Judge Edward T. Gignoux to hear the case. Without objection, Judge Gignoux granted the government's motion to limit the maximum sentence against any defendant to 177 days.[1]

The district court also denied defense motions to dismiss the charges, for a jury trial, for discovery of exculpatory material, and for disclosure of electronic or other surveillance. *In re Dellinger*, 357 F. Supp. 949 (N.D. Ill.). On the government's motion, the court dismissed 89 of the 141 specifications of contempt with which petitioners and their two co-defendants had been charged (Pet. App. 28a).

The remaining 52 specifications were tried before

[1] In reversing the original contempt convictions, the court of appeals had suggested that, if the district court elected so to limit the maximum sentence prior to the second trial, the need for a jury trial would be eliminated. 461 F. 2d at 397.

Judge Gignoux, sitting without a jury. The government's case in chief consisted solely of the official transcript of the Anti-Riot Act trial. At its conclusion, the court dismissed two specifications of contempt and rendered judgments of acquittal on 24 others. This disposed of all charges against two of petitioners' codefendants (*In re Dellinger,* 370 F. Supp. 1304, 1307 (N.D. Ill.)) At the end of the trial Judge Gignoux acquitted non-lawyer defendants Rennard Davis and Thomas Hayden and lawyer-defendant Leonard Weinglass on all charges, and petitioners on some of the charges against them. Petitioners Hoffman, Rubin and Kunstler each were convicted on two specifications and Dellinger on seven specifications of contempt. The court imposed no sentences and discharged petitioners. *Id.* at 1323–1324. The court of appeals affirmed (502 F. 2d 813; Pet. App. 1a–30a).

**ARGUMENT**

1. Petitioners contend (Pet. 53–58) that under *Alderman* v. *United States,* 394 U.S. 165, they were entitled to complete records of electronic surveillance, including alleged overhearings of conversations of petitioners and their co-defendants, counsel and legal staff, before they could be tried for contempt of court. We submit that *Alderman* is inapposite. *Alderman* was based upon the Fourth Amendment exclusionary rule and entitles defendants to discovery of logs and tapes so that they may ascertain, in an unfettered fashion, whether evidence or derivative evidence was obtained through unlawful surveillance. It does not grant "unlimited license to rummage in the files of

the Department of Justice." *Id.* at 185. The defendant's right of access is limited to material that could have produced evidence used at trial, and that could, therefore, be the subject of a motion to suppress. *Id.* at 201 (Fortas, J., concurring in part and dissenting in part); *United States* v. *Lemonakis*, 485 F. 2d 941 (C.A.D.C.) (*en banc*), certiorari denied, 415 U.S. 989.

In the instant case, the government's case in chief was comprised solely of the transcript of the Anti-Riot Act trial. Because this evidence could not have been derived from or tainted by unlawful electronic surveillance, *Alderman* does not require its production.[2]

Petitioners' claim is more in the nature of an asserted right of access under *Brady* v. *Maryland*, 373 U.S. 83, to material that might be exculpatory or favorable to their defense, even though no evidence from the overhearings has been used by the government. Petitioners contend that overhearing of persons on the defense staff could have resulted in government prov-

---

[2] Judge Gignoux stated (*In re Dellinger*, *supra*, 357 F. Supp. at 959):

"Defendants are quite correct that *Alderman* requires disclosure to the defendants of unlawful surveillance records which might conceivably be the source of the government's evidence in the usual federal criminal case. But this Court simply cannot understand *Alderman* to have mandated disclosure of surveillance records in a direct contempt proceeding such as the present one, in which the government's evidence will concern only the courtroom behavior of the defendants and in which it is demonstratively impossible that electronic surveillance could taint the limited evidence upon which the government will rely. This case presents no question of taint and thus does not involve a 'complex' exercise of judgment of the kind described by the Supreme Court in *Alderman*."

ocation of contumacious conduct by defendants and their counsel (Pet. 54–56). However, the government followed a procedure permissible under *Brady* and its progeny by undertaking prior to trial to disclose to defendants any material covered by the *Brady* doctrine (Pet. App. 16a), and to make overhearings available to the court *in camera* to allow it to verify the government's representation that it possessed no exculpatory material. The district court and the court of appeals reviewed these submissions and concluded that they contained no exculpatory material (*In re Dellinger, supra,* 357 F. Supp. at 960, n. 14; Pet. App. 17a). Petitioners' claim, therefore, does not merit further review.

2. Petitioner Kunstler contends that the conduct resulting in his conviction on two specifications of contempt (VI and VII) consisted of vigorous representation of his clients without contumacious intent, and that his actions did not actually tend to obstruct the trial proceedings. He also contends, with respect to one of his convictions, that he was found guilty without proper notice of the charges. We believe that the lower courts accurately applied settled principles to the novel facts of this case, and that there is no need for further review by this Court.

a. The two specifications of contempt are set forth in the petition (Pet. App. 69a–88a). The background events and content of specification VI were summarized by Judge Gignoux as follows (370 F. Supp. at 1319):

> On Friday, January 30, Mr. Kunstler represented to the court that the defendants had

completed the presentation of their "live" witnesses. He requested and obtained a weekend recess so that the defense might locate a cameraman necessary to authenticate a film, the admission of which, together with certain documents, would conclude the defense case. On Monday morning, February 2, Mr. Kunstler informed the judge that over the weekend the defendants had learned that the Reverend Ralph Abernathy had returned to the United States from Europe and would be available to testify later that morning. Mr. Kunstler asked to be relieved of his prior commitment in view of this unforeseen development. The government objected, and the judge denied Mr. Kunstler's motion. At this point, Mr. Kunstler made the extended remarks set forth in Kunstler VI. In the course of these comments, he termed the judge's ruling "about the most outrageous statement I have ever heard from a bench," violating "every principle of fair play;" stated that he felt "disgraced to be here" and that the judge could hold him in contempt if he wished to do so; accused the judge of extreme bias; documented his accusations with a quotation from *The New York Times* which had characterized a prior ruling of the judge as "the ultimate outrage in American justice"; called the trial "a legal lynching"; and concluded with the following observation: "and that, your Honor, is wholly responsible for that, and if this is what your career is going to end on, if this is what your pride is going to be built on, I can only say to your Honor, 'Good luck to you'." Shouts of "Right on" and applause followed.

Petitioner Kunstler's claim that this did not consti-

tute "actual obstruction of justice" (*In re McConnell*, 370 U.S. 230, 236) was properly rejected by the court of appeals, on whose opinion we rely (Pet. App. 4a–5a):

> [T]he extent and violence of Kunstler's diatribe and the bitterness and anger displayed "constituted a vicious personal attack on the judge which could only have served to vent his spleen." 370 F. Supp. at 1319. In no way can Kunstler's remarks be considered as merely heated legal argument and therefore non-contemptuous. Because of the extreme nature of the attack on the trial judge, the remarks of counsel created an imminent prejudice to a fair and dispassionate proceeding, thus constituting an actual and material obstruction of the judicial process. See [*In re Dellinger,*] 461 F. 2d at 400.[3] Moreover, as the trial judge found, Kunstler's conduct "resulted in an entirely un-

---

[3] In *In re Dellinger*, *supra*, 461 F. 2d at 396, Kunstler's remarks constituting specification VI were a principal basis of the court of appeals' holding that the contempt convictions of all the defendants had to be reversed and the case retried before another judge. The court stated with respect to the remarks: "no judge could remain impartial toward Mr. Kunstler after the judge's honestly and integrity were [thus] assailed * * *."

Kunstler's contention that mere "insults" to the trial judge are not sufficient to constitute actual obstruction, although correct (*Holt* v. *Virginia*, 381 U.S. 131, 137), does not aid him. As a noted commentary on the law of contempt states:

"At some point there is more involved than insult; there is a demeanor that converts serious search for truth and justice into a rally run on rhetoric. And it is this, not insult, that justifies the contempt sentence in such cases" (Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 206 (1971)).

necessary and not insignificant delay and disruption of the proceedings" (370 F. Supp. at 1320), reinforcing his holding that there was an actual and material obstruction of the administration of justice.

Petitioner Kunstler contends, however (Pet. 40–44), that both courts below erred in judging his vigorous defense of his client by whether a "reasonable lawyer" would have known that Kunstler's conduct was impermissible. This contention is without substance. Judge Gignoux's finding (370 F. Supp. at 1320) that Kunstler himself knew that his conduct was wrongful is fully supported by the transcript (Pet. App. 69a–72a), and the "reasonable lawyer" standard therefore does not affect the outcome of this case. In any event, the standard of contumacious intent formulated by the court of appeals in *In re Dellinger, supra,* 461 F. 2d at 400, and applied by Judge Gignoux, gave full recognition to Kunstler's arguments regarding "the peculiarly individualistic aspects of advocacy" (Pet. 42–43).[4] Nor, contrary to Kunstler's suggestion, is

[4] The court stated:

"Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows. Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent only *if he knows or reasonably should be aware in view of all the circumstances*, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth" (emphasis added).

there any conflict between the circuits on the correct standard of intent.[5]

b. Specification VII (Pet. App. 73a–88a) was summarized by Judge Gignoux as follows (370 F. Supp. at 1320):

> On the morning of February 2, following the judge's denial of Mr. Kunstler's motion for leave to present the Reverend Ralph Abernathy as a defense witness (see Kunstler VI), the judge called on the defendants either to present further evidence or to rest. Mr. Kunstler stated that the defendants were not going to rest, as Dr. Abernathy was on his way from the airport and prepared to testify. Over Mr. Kunstler's

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[5] In *Caldwell* v. *United States*, 28 F. 2d 684 (C.A. 9), cited by Kunstler as in conflict with the Seventh Circuit's standard, the issue was whether a question by defense counsel was a "willful" attempt to evade a ruling by the trial court sustaining objection to his previous question. In reversing counsel's contempt conviction, the court of appeals said:

"If counsel here *reasonably believed* the subject material, it was his right, if not his duty, to disclose specifically what he expected to show, either by an offer of proof or by a question substantially in the form of that asked * * *" (emphasis added).

The other cases cited by petitioner (Pet. 41, nn. 29, 30) likewise present no conflict, as the Seventh Circuit recognized in *United States* v. *Seale*, 461 F. 2d 345, 367–369. *Offutt* v. *United States*, 232 F. 2d 69 (C.A.D.C.), certiorari denied, 351 U.S. 988, for example, held that where "clearly blameworthy" conduct is present, a finding of contumacious intent may be dispensed with altogether, but where such conduct is absent, "some sort of wrongful intent" must be shown. 232 F. 2d at 72. Whatever the merits of this distinction, wrongful intent was found in the instant case, and petitioner Kunstler's conduct was therefore contumacious under even the most rigorous standard. See, also, Specification VII: petitioner Kunstler expressly announced (Pet. App. 74a) that he would intentionally disobey a court order.

objection, the judge rested for the defendants. At the request of government counsel, the judge ordered the defendants and their counsel to make no reference before the jury to the fact that they wanted Dr. Abernathy to testify. There ensued the colloquy set forth in Part I of Kunstler VII, in which Mr. Kunstler stated that he was not going to abide by the court's order; that he was going to repeat his motion before the jury; and that the judge would have to send him to jail. The jury then returned to the courtroom, and the judge informed the jury that since the defendants were not ready to proceed, he had rested for them. Mr. Kunstler objected and informed the jury that the defendants were prepared to go ahead with Dr. Abernathy. Shortly thereafter, Mr. Kunstler interrupted the examination of the government's first rebuttal witness to inform the court that Dr. Abernathy had just arrived. There then ensued, in the presence of the jury, the colloquy set forth in Part II of Kunstler VII, during which Mr. Kunstler renewed his motion to call Dr. Abernathy as a defense witness and persisted in arguing the motion after it had been denied by the judge and after the judge had repeatedly ordered him to sit down.

The court of appeals affirmed Judge Gignoux's finding of contempt, stating (Pet. App. 7a):

> The facts under this specification are clearly contempt because Kunstler violated a court order [*In re McConnell*, 370 U.S. 230]. Further, he obstructed justice by putting before the jury information that had been ruled inadmissible, making it more difficult for the jurors to decide the case according to the law

> as interpreted by the district judge. As we previously held, lawyers are required to obey even incorrect orders; the remedy is on appeal. [*In re Dellinger,*] 461 F. 2d at 398.

See also *Maness* v. *Meyers,* No. 73–689, decided January 15, 1975, slip op. 9–10.

Petitioner Kunstler's contention that he did "no more than take account of the intervening facts" (Pet. 39) when he informed the jury that the defendants were prepared to go ahead with Dr. Abernathy is without substance. There was no "intervening fact" other than the trial judge's notification to the jury that he had rested for the defendants because they had refused to,[6] and petitioner Kunstler's own response (Pet. App. 76a), revealing in the presence of the jury the very information he had been forbidden to reveal. Even assuming, however, that petitioner was entitled to mention Dr. Abernathy in response to the judge's statement, there was no justification for his persistence in arguing the motion over the judge's repeated orders to stop (Pet. App. 85a–88a).

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[6] It was, of course, incumbent upon the trial judge to inform the jury that it was again the government's turn to present witnesses. Had he stated merely that "the defense has rested," petitioner surely would have objected to this as a "misstatement" (Pet. 18–19) and asserted his right to correct it. Yet petitioner contends that by apprising the jury that he had rested for the defendants, and explaining why, the judge dissolved *sub silentio* his order forbidding reference to Dr. Abernathy's testimony. The result of this reasoning would be to strip the trial court of the authority to enter such an order. However mistaken the order may have been, as the court of appeals observed, the forum for review of the court's order was on appeal.

c. There is no merit to petitioner Kunstler's claim (with respect to specification VII) that he was convicted upon a charge not made (Pet. 45–49). The specification stated (Pet. App. 73a) that Kunstler was ordered "not [to] mention the name of the Reverend Abernathy in front of the jury"; in fact the court's order had been that he make no statement to the effect that the defense wanted Dr. Abernathy to testify. The difference is one of semantics only, for both statements forbid the same conduct. Moreover, petitioner clearly understood the order at the time; he did not ask for clarification but instead declared his intent to violate it (Pet. App. 73a–74a). Finally, as the court of appeals pointed out, because "the specification quotes Judge Hoffman's orders verbatim, there could be no doubt what Kunstler was charged with violating" (Pet. App. 8a).

3. All petitioners contend that their convictions were unconstitutionally discriminatory because the government, in prosecuting them for contempt, "proceed[ed] in the theory that the contempt process is to be employed only against defense counsel and not against prosecutors guilty of the same acts" (Pet. 50). This contention is inaccurate. The contempt charges were initiated not by the government but by the trial judge in whose court the contempt occurred. Although the court of appeals, in reversing the defendants' convictions for violation of the Anti-Riot Act, concluded that "the demeanor of the judge and prosecutors would require reversal if other errors did not" (*United States* v. *Dellinger, supra,* 472 F. 2d at 391), the same court in *In re Dellinger, supra,*

461 F. 2d at 401, expressly declined to dismiss the contempt charges against petitioners (except as to those legally insufficient) because of judicial and prosecutorial misconduct. The government clearly was justified by this judicial decision—irrespective of any belief on its part that contempt is a remedy more necessary against defense misconduct than against prosecutorial misconduct—in reprosecuting petitioners.[7] The government's testimony in the district court satisfied both courts below that its purpose in going forward with the prosecution was not discriminatory against defense counsel as a class and had a rationa. basis (Pet. App. 14a, 36a–37a). Accordingly, petitioners' claim merits no further review here.

Nor, finally, is there merit to petitioners' contention that the Anti-Riot Act trial "was so infected by prosecutorial and judicial misconduct that there was no judicial proceeding upon which a conviction for contempt could be sustained" (Pet. 62). The court of appeals rejected this contention on three separate occasions. Petitioners made a massive contribution to the breakdown of the judicial process. Although petitioners were not the only individuals responsible for this breakdown, they are not immune from responsibility for consequences occasioned in large measure by their conduct. Based upon Judge Gignoux's observation (370 F. Supp. at 1321)

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[7] As the United States Attorney testified in the district court, it was the government's belief that if it abandoned the prosecution it would break faith with every district judge in the nation (Tr. 2502). Although this may be an overstatement, it discloses a legitimate basis for the prosecution.

> that the contumacious conduct of the defendants and their lawyers cannot be considered apart from the conduct of the trial judge and prosecutors. Each reacted to provocation by the other, and the tensions generated during four and a half months of so acrimonious a trial cannot be ignored[.]

Judge Gignoux concluded that "the affirmation of the integrity of trial proceedings and the goal of deterrence have both been achieved by the findings of guilt," and that no sentences or fines should be imposed upon the defendants (*id.* at 1321–1322). Without agreeing or disagreeing with the wisdom of this course, the court of appeals concluded (Pet. App. 29a):

> To insure continuing respect for the judicial system, it was necessary to try the defendants for the overwhelming misconduct they demonstrated at the conspiracy trial.

We rely upon that conclusion.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*
JOHN C. KEENEY,
*Acting Assistant Attorney General.*
PETER M. SHANNON, Jr.,
MICHAEL FARRELL,
*Attorneys.*

FEBRUARY 1975.

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# Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-714**

DAVID T. DELLINGER, ABBOTT H. HOFFMAN, JERRY C. RUBIN, and WILLIAM M. KUNSTLER,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

MORTON STAVIS
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

*Attorneys for Petitioners*

Adams Press Corp., 130 Cedar Street, N. Y.—Beekman 3-1050-51

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1974

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No. 74-714

DAVID T. DELLINGER, ABBOTT H. HOFFMAN, JERRY C. RUBIN, and WILLIAM M. KUNSTLER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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I. THE ELECTRONIC SURVEILLANCE ISSUE

Concededly, the issue whether Alderman v. United States, 394 U.S. 165 (1969), is applicable to a direct contempt case is an important question never heretofore passed upon by the Court.

Petitioners contend in their petition that the Seventh Circuit's opinion is

written as if Alderman had never been decided. The government's response is simply to ignore the real electronic surveillance issues in this case as well as the state of the record.

A.

Petitioners' contention is that throughout the original trial before Judge Hoffman, situations were created by the government*/ which had the effect of goading the parties on the defense side into responses for which they could be charged with contempt.

The record in the original trial strongly indicates that the government sought to buttress its thesis that the defendants were the offenders in Chicago in 1968, and not, as they claimed, the

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*/ It was not until November of 1972 that the Circuit Court in its lengthy opinion finally made clear that the government's action at the trial constituted gross misconduct. United States v. Dellinger, 472 F.2nd. 340, 389-391.

victims of a police riot, by pointing to the conduct of defendants in court which the government had itself induced.*/ It is the petitioners' contention that this goading of the defendants was based upon a close monitoring through electronic surveillance of their own phones, those of their attorneys, and those of their staff to ascertain their activities and moods so that the government would know exactly what stimuli to apply and when.**/

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*/ The government in support of the conspiracy indictment charged the defendants with being "violent anarchists" (Tr.21334) and tried repeatedly to transfer the conspiracy to the courtroom: If the jury believed that the defense was attempting to disrupt the trial, it would be easy for it to believe that the defendants had conspired to disrupt the 1968 convention. In its summation, the government tried to join together these so-called conspiracies in the minds of the jurors: "You know the other assault they made in this courtroom is an assault on the law itself." (Tr. 21327).

**/ Such a program by the government is entirely consistent with the disclosures of a few months ago of the FBI's counter-intelligence program and how it functioned so as to stimulate res-

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The government simply ignores this entire contention. It merely repeats - despite the clear contrary indications in the record - that "the transcript...could not have been derived from or tainted by unlawful electronic surveillance," claiming, therefore, that Alderman is inapplicable.

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ponses within allegedly radical organizations; the even more recent disclosure of the surreptitious mailing by the FBI to Mrs. Martin Luther King of a tape recording purportedly made of her husband's activities in the hope of inducing some reaction from him; and the cascading revelations of seamy infiltration activities by the CIA.

Beyond that, however, petitioners discovered through disclosures made by the government in the civil suit brought by them in the United States District Court for the District of Columbia, in which they are seeking damages for electronic surveillance, Dellinger v. Mitchell, No.17-68-69, that an important part of the electronic surveillance program was the determination of the "mood" of particular individuals. Those disclosures were filed with the Circuit Court and are consistent with the emerging knowledge the American people are acquiring, that much of the "intelligence" programs concerns itself with gathering information about the personal lives of objects of governmental surveillance, especially political dissidents, for such use as government agents seek to make.

But the trial transcript is not a document which emerged out of nowhere; it is rather, in petitioners' view, the most likely fruit of the government's electronic surveillance program, and accordingly, this is precisely the kind of case requiring the revelation of electronic surveillance to petitioners so that they may demonstrate taint. If through unlawful electronic surveillance the government knew how to fashion, time, and direct its provocations so as to have the maximum effect in triggering responses from the defendants, then the transcript is certainly the fruit of electronic surveillance. And if those responses of the defendants are the basis of contempt prosecutions, then how can it be said that Alderman does not mandate the disclosure of such unlawful electronic surveillance?

B.

Aside from petitioners' contentions that the entire transcript reflects responses to well-calculated provocations, a detailed study of contempt citation VI against William Kunstler, strongly suggests that electronic surveillance was most likely a vital factor in the evolution of that charge.

It will be recalled that this citation arose out of Mr. Kunstler's having ascertained over the weekend of January 31-February 1, 1970, that Dr. Abernathy, long sought as a defense witness, had come back to the country. After the trial before Judge Gignoux, Mr. Kunstler, based precisely upon the procedure suggested by Judge Gignoux, */ pointed out that his know-

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*/ Judge Gignoux had reserved to defendants, 'the right to renew such motions [for disclosure of electronic surveillance] at or after trial upon a showing that the government's evidence had been or

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ledge of Dr. Abernathy's arrival had been ascertained by telephone calls and the government's monitoring of those calls could have been an explanation for its unusually rigid opposition to permitting Dr. Abernathy's testimony, an opposition that did not vanish until it was too late for Dr. Abernathy to appear.*/ The govern-

(fn. cont. from preceding page)
conceivably could have been tainted by unlawful surveillance." 357 F.Supp. at 962; emphasis supplied. Defendants in their post-trial motion analyzed the specific charges upon which Mr. Kunstler had been found guilty of contempt and pointed out that both arose out of the strange circumstance of Dr. Abernathy's becoming available to testify, that that knowledge was ascertained by the defendants "through members of the defense staff and associates in the courts of telephonic communications which were had on January 21 [sic should be 31] and February 1, 1970; that the Reverend Abernathy's schedule for arrival in court was similarly ascertained" and accordingly it was highly conceivable that "the entire scenario of the government's opposition to the Reverend Abernathy's taking the stand and Judge Hoffman's ruling in respect thereto could have resulted from unlawful surveillance, thereby establishing direct taint of the very substance of the alleged contempt."

*/ See Petition, pp.19-20.

ment could well have learned through electronic surveillance the content of Dr. Abernathy's testimony, including the fact that he would impeach a key government witness and therefore decided to oppose awaiting his arrival from the airport to put him on as a defense witness.

C.

The government continues the effort to confuse a major issue, namely, that it was the overhearings of the defense staff that were critical and that the entire procedure by which the government made in camera presentations to the court resulted in the Seventh Circuit's being completely misled on the facts. We believe the Seventh Circuit may have been led to believe that all electronic surveillance was submitted in camera, when in fact, the government flatly refused to turn over electronic surveillance of the defense staff.

The government's brief before this Court continues the same misleading process. It says that the government made "overhearings available to the court in camera to allow it to verify the government's representation that it possessed no exculpatory material" (government's response, p.6). The government carefully does not mention that it at all times refused to reveal electronic surveillance of the defense staff, either to the defendants or to the court in camera.

Moreover, the government (response, p.5), without any justification therefor, has taken the view that Alderman is in effect limited by Brady v. Maryland, 373 U. S. 83 (1963) to material the government considers exculpatory. We know no justification for such an analysis; Alderman is not limited to exculpatory material and Alderman specifically forbids a pre-turn-

over screening by the government, or even by the court.

## II. THE CONTENT OF THE KUNSTLER CONTEMPTS AND THE PROCEDURAL ISSUE AS TO THE CONSISTENCY OF THE CHARGES AND THE CONVICTION WITH RESPECT TO KUNSTLER VII.

### Kunstler VI

A major point in our petition was that Kunstler VI must fail because it did not constitute "actual obstruction of justice," the test laid down by this Court in In re McConnell, 370 U.S. 230, 236 (1961). We pointed out in detail that the three-sentence treatment of this issue in the Circuit Court's opinion simply fails to supply the missing element of "obstruction." The jury was not present; there was no reprimand from Judge Hoffman; nor even a direction that Mr. Kunstler stop talking; there was no coarse language; and the Circuit Court found that the trial had long since ceased to be a fair and dispassion-

ate proceeding, United States v. Dellinger, 472 F.2d 340, 385-91 (1972).*/

As the jury, the fact trier, was not present, and as the trial judge had long before demonstrated he was not fair and dispassionate, Mr. Kunstler's remarks late in the trial could not conceivably have prejudiced a "fair and dispassionate proceeding.

The government's response to these arguments is to ignore them. It simply says, without argument or explanation, that it relies on the opinion of the Seventh Circuit (government's response, p. 8).**/

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*/ The Circuit Court found from the record that "the District Judge's deprecatory and often antagonistic attitude toward the defense is evident in the record from the very beginning." United States v. Dellinger, supra, 472 F.2d at 376.

**/ The government quotes from Dobbs, "Contempt of Court, a Survey," 56 Cornell L.Rev. 183, 206 (1971). But its quotation is quite inappropriate. Firstly, Mr. Dobbs was referring to United States v. Schiffer, 351 F.2d 91 (6th Cir. 1965), where the court had been careful to point out that

(fn. cont. next page)

## Kunstler VII

In their presentation to this Court, petitioners pointed out an unusual feature of the treatment of Kunstler VII by both the District Court and the Seventh Circuit, namely, their failure to deal with twelve crucial pages of transcript which were included in petitioners' appendix.*/

The government's response to the petition continues this practice of ignoring the record. While the government refers to the matter (government's response, p. 12), there is no straight forward acknow-

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the trial judge "had infinite patience. He did not engage in wrangling or bickering with counsel. He did his utmost to preserve order and decorum." 351 F.2d at 95. On the following page, Mr. Dobbs emphasized that cases such as he was referring to were to be distinguished from situations which "reflect misbehavior by the judge. Sometimes it is behavior that would be regarded as contempt if committed by others. At other times judges provoke irritable responses from attorneys by their own hostility or unprofessional conduct."

*/ These transcript pages occurred between the two parts of Kunstler specification VII but are omitted from the specification.

ledgement of the fact that long before the alleged contempt, there was a colloquy initiated by the judge and in the presence of the jury (quoted in full at p.18 of the petition), as a result of which the jury was wholly and fully appraised of the fact that the defendants had sought to have Dr. Abernathy testify. This followed because of the unneccessary and prejudicial statement by the trial judge that the defendants "have no further evidence to present" (petition, p.18).

On the matter of the procedural aspects of Kunstler VII, the government suggests that there is only a semantic difference between the charge made and the charge of which Mr. Kusntler was convicted.

But, as pointed out in the petition, the difference rather than being semantic was critical. The District Court and the Circuit Court have simply failed to read

the transcript with care and to recognize that Mr. Kunstler as a lawyer, was listening to the precise words of the court's order, and did not violate them.

Mr. Kunstler was actually convicted of making an application to the court to permit the Reverend Abernathy to testify. Had the court made an order not to mention the name of Rev. Abernathy before the jury, that would have been another matter. But the court never made such an order and Mr. Kunstler knew it. The only order of the court was not to mention "that they wanted Dr. Abernathy to testify."

Mr. Kunstler in good faith believed that making an application to the court "to reconsider to put him on the stand as a witness for the defense" (85a) was not a violation of the court's order.

Whether this was or was not a violation is not a matter of semantic difference

but a question of fundamental procedural due process; he was charged with violating an order that in fact was not made.

In its response (p.12), the government, as did the Seventh Circuit, suggests that Mr. Kunstler could be found guilty of contempt "for his persistence in arguing the motion over the judge's repeated orders to stop." But there is not a word in the charges made by Judge Hoffman, and on which Mr. Kunstler was tried, suggesting that persistence in arguing was intended to be part of the content of specification VII and an issue against which he had to defend. The entire thrust of the charge and the trial before Judge Gignoux was whether he had violated a court order in bringing matters to the jury's attention, not whether he had been overly persistent. This procedure of deciding after a trial that a defendant "could have" been charged

with something of which he was not charged is of the essence of the denial of due process. Eaton v. Tulsa, 415 U.S. 697 (1974); Cole v. Arkansas, 333 U.S. 196 (1948).

III. THE INTENT ISSUE.

The government argues that there is no "conflict between the circuits on the correct standard of intent" (government's response, p.10).

But the Seventh Circuit, which ruled on this question, found such conflict. It expressly said: "Taking the element of intent first, it should be observed initially that this requirement has received a variety of treatment in different courts." United States v. Seale, 461 F.2d 345, 367 (1972). It then proceeded to analyze the cases referred to by the government and expressly reject the standard employed in the District Court for the District of

Columbia. The Seventh Circuit found conflict among the circuits, not only on the question whether there is a requirement of intent but also how "the requisite intent is defined," id. at 368. And again, the Seventh Circuit charts its course through a maze of conflicting federal circuit court decisions on the issue of the quality of intent required.

If the Seventh Circuit is of the view that there is a conflict of the circuits on both the existence of a requirement of intent and the definition of such a requirement, then we consider that it is settled that there is in fact a conflict among the circuits. The government's bland denial of the existence of such a conflict will hardly furnish what the federal judiciary and the bar as a whole are entitled to, namely, a clear expression of a uniform standard of the intent require-

ment of contempt.*/

IV. THE ISSUE OF DISCRIMINATORY PROSECUTION.

The government erroneously states that "all petitioners contend that their convictions were unconstitutionally discriminatory" (government's response, p. 13). The petition for certiorari makes clear that the question of discriminatory prosecution is raised as to the petitioner Kunstler alone (see Question No.5, p.3).

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*/ The government's suggestion that all this is irrelevant because of Judge Gignoux found "that Kunstler himself knew that his conduct was wrongful" (government's response,p.9) misses the point. Firstly, Judge Gignoux was merely referring to the content of the specification, not the evidence at the remand trial before him, where Mr. Kunstler without contradiction testified that he did not intend to be contemptuous and that his statement in the specification referred merely to a prediction that Judge Hoffman would hold him in contempt and was not an acknowledgement that he believed his conduct wrongful.

In any event, since Judge Gignoux may have followed an inappropriate standard of intent, it is not possible to determine upon what basis he rendered his decision. Eaton v. Tulsa, 415 U.S. 697 (1974).

The government's error on this point reveals a failure to note the significance of the issue. This is a matter of discrimination between two classes of lawyers - government lawyers and defense lawyers.

But this is not the only misconception of the issue by the government. The government argues that the prosecution was justified because the Circuit Court, despite its finding of misconduct by the judge and prosecutor, had expressly declined to dismiss the charges against the petitioners on the grounds of judicial and prosecutorial misconduct (government's response, pp.13-14).

The government has inverted the time sequence of the two Seventh Circuit decisions. When the Seventh Circuit declined to dismiss contempt charges against the petitioners, 461 F.2d 389 (1972), it had not as yet made its findings of judicial

and prosecutorial misconduct. That did not come until six months later when it decided the substantive case, 472 F.2d 340 (1972).

Secondly, the government seeks to paint the picture that it was merely acting on the direction of the court. But the facts are quite the contrary. The government had no compunctions about dropping the Bobby G. Seale contempt case when it was required to disclose its illegal electronic surveillance logs (see petition, p.52, fn.1). Nor did it have any doubt of its power not to proceed with respect to 89 of the contempt specifications which it chose to drop (government's response, p.3). Indeed, two days before the trial before Judge Gignoux there was a conference in Washington at the Department of Justice on whether or not to proceed with this case (petition, p.9, fn.8). Obviously, the

government had to power to drop the charges if, as, and when it chose.

Thus, the government's reasons seeking to avoid responsibility for the discriminatory prosecution in this case are spurious. We have here an unvarnished, naked determination by government prosecutors to proceed against defense lawyers because they are defense lawyers, while adhering to the view that their own colleague prosecutors should not be prosecuted for their "contumacious conduct."

## CONCLUSION

The government ends its response with a quotation from the last paragraph of the Seventh Circuit's opinion, as follows: "To insure continuing respect for the judicial system, it was necessary to try the defendants for the overwhelming misconduct they demonstrated at the conspiracy trial." (Emphasis added.)

Since in the case of Mr. Kunstler, the two specifications occurred on one day in the last two weeks of a four and a half month trial, the circuit must have been referring to specifications of which he was acquitted, or which the government chose not to prosecute, or to the conduct of others. Such a statement harks back to the panic which this case originally generated, but which subsequent study revealed to be unfounded.*/

The American system of justice requires that defendants be convicted only on specific charges and not for general reputation, items not charged, or the conduct of others. This is indeed the essence of due process of law. "Respect for the

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*/ See, Preface and Report of the Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, Disorder in the Court.

judicial system" would flow from a forth-right adherence to that principle.

Respectfully submitted,

MORTON STAVIS
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003

Counsel for all Petitioners

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